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No.

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

CHRIST COLLEGE, INC., *et al.*,  
*Petitioners*,  
v.

BOARD OF SUPERVISORS, FAIRFAX COUNTY, VIRGINIA, *et al.*,  
*Respondents*.

**Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Must the strict scrutiny balancing test of *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972), as recognized for free exercise "hybrid rights" in *Employment Division v. Smith*, 110 S. Ct. 1595, 1601 (1990), be used to determine the validity of government actions that limit the ability of religiously-motivated parents to direct the religious upbringing of their children, limit the ability of children to receive a religious education, and limit the ability of teachers to fulfill their religious mission of communicating religious instruction?
2. May there be a cause of action for violation of free exercise "hybrid rights" based upon allegations that discretionary governmental actions taken under color of facially neutral laws, "as applied" to religiously-motivated conduct, prevented and otherwise severely burdened that conduct?
3. Is it impossible as a matter of law for government actions that close down and limit a religious school to cause a burden upon the exercise of religion by the people who, because of religious motivations, operate, attend and send their children to that school?
4. Is it a violation of the Establishment Clause for a government agency to prohibit a religious school from continuing to use a church sanctuary for Bible classes and other religiously-oriented instruction, when the agency has not articulated any reason for the prohibition?

## PARTIES TO THE PROCEEDING

### *Petitioners*

Rev. Robert L. Thoburn (Parent; Teacher; School Owner and Founder)  
Rosemary S. Thoburn (Parent; Teacher; School Co-Founder)  
Lloyd L. Thoburn (Parent; School Administrator)  
John M. Thoburn (Parent; School Project Manager)  
Judy K. Dryden (Parent; Part-Time Teacher)  
Glenn T. Dryden (Parent)  
Dorothy L. Thoburn (Student)  
Christ College, Inc. (Prospective Lessor) \*

### *Respondents*

Board of Supervisors, Fairfax County, Virginia\*\*  
Richard A. King, Acting Fairfax County Executive  
(in his official capacity)\*\*\*  
Town of Vienna, Virginia  
Vienna Board of Zoning Appeals

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\* There is no parent or subsidiary to this corporation.

\*\* The following members of the Board of Supervisors were sued in their official capacities: Joseph Alexander, Sharon Bulova, Thomas M. Davis, III, Katherine D. Hanley, Gerald Hyland, Elaine McConnell, Audrey C. Moore, Martha V. Pennino, and Lilla Richards.

\*\*\* Mr. King is substituted pursuant to Supreme Court Rule 35.3 for J. Hamilton Lambert, who has resigned as Fairfax County Executive and who was sued in his official capacity.

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**Petition for Writ of Certiorari to the  
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**PETITION FOR WRIT OF CERTIORARI**

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Petitioners respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

**OPINIONS DELIVERED IN THE CASE  
BY OTHER COURTS**

The unpublished opinion by the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix ("App.") at 1a-19a<sup>1</sup> and cited in a table of opinions at 944 F.2d 901 (4th Cir. 1991). The transcript of the unpublished oral opinion by the United States District Court for the Eastern District of Virginia, Alexandria Division, is reprinted App. at 26a-29a.<sup>2</sup>

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<sup>1</sup> The court of appeals' amendments to that opinion are reprinted App. at 20a-23a.

<sup>2</sup> The district court's order is reprinted App. at 30a.

## JURISDICTION

The Fourth Circuit entered its judgment in this action on September 13, 1991. No rehearing was requested. This Petition is filed within 90 days of that judgment, pursuant to 28 U.S.C. § 2101(e) and U.S. Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment of the Fourth Circuit by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant parts of the following authorities are set forth verbatim in the Appendix:

U.S. Const. Amend. I

U.S. Const. Amend. XIV, § 1

42 U.S.C. § 1983

Va. Code Ann. § 15.1-490 (1989)

Va. Code Ann. §§ 22.1-254-66 (1985 and Supp. 1991)

Va. Code Ann. § 27-101 (Supp. 1991)

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Fairfax County, Va., Zoning Ordinance, Article 3  
(Reprint 1988) (excerpts)

Fairfax County, Va., Zoning Ordinance, Article 9  
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May 19, 1989, Letter from Theodore Austell, III,  
Clerk to the Board of Supervisors, to Robert L.  
Thoburn

## STATEMENT OF THE CASE

This is primarily a free exercise case that both the petitioners and respondents unsuccessfully argued should be decided under the principles enunciated in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). The courts below declined to apply *Smith*, amid expressions of confusion and uncertainty as to its holdings.

The petitioners complain that their efforts to relocate Fairfax Christian School to a centralized location in Fairfax County, Virginia, were transformed by a series of unprecedented and unconstitutional local government actions into a forced migration. Or, as the unrefuted testimony of one witness concisely put it: "The County was chasing Fairfax Christian School like a pack of dogs after a deer." Joint Appendix in the United States Court of Appeals for the Fourth Circuit ("J.A.") 1821. Respondents argue that the actions were an appropriate exercise of police powers.

The case was filed on August 1, 1989, in the United States District Court for the Eastern District of Virginia, Alexandria Division, to redress violations of rights secured by the First and Fourteenth Amendments to the Constitution of the United States. Deprivations of those rights were alleged under 42 U.S.C. § 1983, and the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

### Petitioners

All of the individual petitioners are evangelical Christians. Five of them are parents of children who attended Fairfax Christian School during the period of alleged violations: Rev. and Mrs. Robert L. Thoburn, Mr. and Mrs. Glenn T. Dryden, John M. Thoburn and Lloyd L. Thoburn. All of these parents, except for Mr. Dryden, taught or otherwise were employed at the school at relevant times. Dorothy L. Thoburn was eight years old when she testified at trial in 1990; she is, and was at all relevant times, a student at the school. Christ College, Inc., is a non-profit evangelical Christian college that was denied permission by respondent Fairfax County to conduct evening and Saturday classes at a site sought for Fairfax Christian School.

### Fairfax Christian School and Its Relationship to Petitioners

Fairfax Christian School is a widely-recognized evangelical Christian teaching mission. J.A. 1585, 1732, 1734, 1768, 1939, 2031-32. The school was founded in 1961

by Rev. Thoburn, an ordained Presbyterian minister and religious educator who has helped start approximately 200 Christian schools in the United States. J.A. 1441, 1515-16, 1518. He is the owner and sole proprietor of Fairfax Christian School. J.A. 1581. Rev. Thoburn's wife, Rosemary, who is a teacher at the school, co-founded it. Fairfax Christian School is a co-ed college-preparatory institution for grades kindergarten through 12. J.A. 1521. All of the students who have graduated from the school have gone on to college. J.A. 1743. It is stipulated to be "a fine school." *Id.* Attendance there fully satisfies the Virginia compulsory education law. Va. Code Ann. §§ 22.1—254-66 (1985 and Supp. 1991).

As the trial court found, "There isn't any question that their evidence shows that the Thoburns and the people involved in this school are dedicated Christian people, and they are dedicated to providing a school for Christian education and have done so." App. at 27a. The petitioners believe that the Bible should be a required course in elementary and secondary education and that all academic subjects must be taught to children from an evangelical Christian, Bible-based perspective. J.A. 1516-17, 1741, 1810, 1814, 1939, 2015-16, 2031. This religious belief is exercised through activities at Fairfax Christian School. *Id.* The school expects its students to pray collectively before class and in special devotions periods, to study the Bible as the word of God and to treat all other subjects from an evangelical Christian perspective. J.A. 1516-18, 1521-22. Thus, for example, evolution is characterized in Fairfax Christian School science classes as a false theory that is contrary to the creationism that the Bible teaches.

Parents are required by law in Virginia to ensure that their children are educated by qualified schools or tutors. Va. Code Ann. §§ 22.1-254-66 (1985 and Supp. 1991). Fairfax Christian School is the only school in the county that meets the inextricably intertwined legal, religious and parental needs of the individual petitioners.

J.A. 1521, 1742-43, 1810-11, 2016-17. For evangelical Christians such as the parent petitioners, sending their children to public schools would be antithetical to their faith, destructive to their family relations and confusing to their children. J.A. 1517-18, 1741, 1811-12, 1814, 2016-17. In public school, their children could not be taught the central importance of God and prayer. Indeed, in public school, petitioners' children would be taught by authority figures things that their parents consider wrong and harmful to basic family values, such as evolution and prevailing attitudes toward student sexual activity. *See, e.g.*, J.A. 2016-17.

#### **The Governmental Actions Affecting Petitioners**

In 1984, Fairfax Christian School was a thriving institution for more than 500 students, with a wooded campus on Pope's Head Road in one of the more rural parts of Fairfax County. J.A. 1517, 1519-21. The missionaries who run the school decided at that time to accept a generous offer to buy their campus so that they could use the money to improve their facilities and relocate the school in a more centralized residential location. J.A. 1523-24. They decided to purchase approximately 40 wooded acres in a residential section of Oakton, Virginia, on which to build their new mission. J.A. 1526-29. Before purchasing the Oakton site, however, Rev. Thoburn had sought and received assurance by county officials that the site was a "good place" for a school and that there would be "no problems" putting Fairfax Christian School there. J.A. 1527. Rev. Thoburn purchased the Oakton site and some surrounding land with the proceeds received from the sale of the Pope's Head Road property and with borrowed money. J.A. 1523-25.

Under the county zoning ordinance, Fairfax Christian School had to obtain a "special exception" before it would be allowed to occupy residential property.<sup>3</sup> Special ex-

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<sup>3</sup> A "special exception," despite its name, is a relatively common zoning permit that is needed to establish a wide variety of uses.

ception applications to build Fairfax Christian School on the Oakton property were submitted to respondent Fairfax County Board of Supervisors for decision in 1985 and in 1987.<sup>4</sup> The first was denied on a 4-to-4 vote by the nine-member body; the second was denied by a 5-to-4 vote. J.A. 1535-37, 3377.

Citizen opposition to relocating the school in that neighborhood came not only from those living in the surrounding "very large estates," but from others who lived as far as 12 miles away. J.A. 1535. The principal public reason given by Board members for denial of the special exceptions was that the proposed Fairfax Christian School campus was not in harmony with the county's Comprehensive Plan, allegedly because the school would create an unacceptably high intensity of use on the 40 acres, increase surrounding area traffic and cause environmental problems by having portions of two ballfields in a 100-year flood plain of an Environmental Quality Corridor. J.A. 1535-37, 3496-99. At the hearings on the special exception applications, evidence was given of county approval of school uses that created greater intensities of use, traffic and environmental effects.<sup>5</sup> J.A. 3383-85.

While attempting to obtain approval for the Oakton site, Fairfax Christian School was located in temporary

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<sup>3</sup> [Continued]

A special exception is needed in *all* residential districts in Fairfax County to establish a "private school of general education" that has an enrollment of 100 or more students daily. Fairfax County, Va., Zoning Ordinance 9-301, 9-302. App. at 53a, 54a. Residential districts comprise more than 90 percent of all zoned land in Fairfax County. J.A. 1729, 1765; *see also* Brief of Appellants at 15-16.

<sup>4</sup> The 1985 action by the Board is barred by the statute of limitations. The evidence that was admitted was offered by petitioners to show an alleged pattern.

<sup>5</sup> Evidence was offered at trial to show that both public and private schools and uses were approved by the county respondents despite similar, or far worse, intensity, traffic, or environmental effects. Virtually all of this evidence was excluded by the trial court. J.A. 1413-21, 1950-83, 2073-76.

quarters at Temple Baptist Church and Jerusalem Baptist Church in Fairfax County on Route 123. J.A. 1525-26, 1540-41. In early 1988, respondent county sent a letter to Jerusalem Baptist Church inquiring into that Church's tax exempt status because of the location there of Fairfax Christian School, which pays taxes as a for-profit organizational structure. J.A. 1544-48, 3505. As a result of that inquiry, Fairfax Christian School lost its lease at the end of the school year and had no place to meet in the fall. J.A. 1544-48, 1766.

To provide another temporary location for the school in the county, renovations were begun in 1988 on three residential houses on 29 wooded acres on Hunter Mill Road near the Dulles Toll Road. J.A. 1548-50. This property was owned by members of the Thoburn family. *Id.* The modifications of the houses into school buildings were performed under residential, not commercial permits, but according to the higher, commercial standards applicable to a school. J.A. 1550. County Executive Lambert admitted at trial that there was nothing illegal about making such modifications under residential permits. J.A. 1717-19, 2068. Respondent county sent commercial as well as residential inspectors to inspect the Hunter Mill Road properties and, with knowledge that the Thoburns intended to build a school there, the county allowed renovations to proceed without significant issue until September. J.A. 1550, 1943-44.

On August 30, 1988, the Thoburns learned that *The Washington Post* would publish the next day an article about the potential for Fairfax Christian School opening up that fall at the Hunter Mill Road site without fulfilling all county zoning requirements. J.A. 1555, 1717-19. Concerned about the effect of this article on already-strained relations with the county government, members of the Thoburn family went to Mr. Lambert immediately and assured the County Executive that the school would not be opened until the county was satisfied that all safety requirements were met. J.A. 1555-56, 1717. What

they hoped for, they said, was to complete all necessary modifications to the buildings on the site, have them inspected for safety and receive, as an accommodation to their religious interests, temporary permission to open the school while the special exception application papers were being processed. J.A. 1554-56. County Executive Lambert said that he would get back to the Thoburns. He did, two days later. Despite the Thoburns' assurance that the school would not be opened without county approval, suit papers were served on the unsuspecting and unprepared Thoburn family. J.A. 1556-57. At the same time, statements impugning the motives of the Thoburns and raising questions about the safety of the school site were given to the press by county officials and reported publicly. J.A. 1756-58, 1942. On September 13, 1988, the Thoburns were enjoined from opening Fairfax Christian School at the Hunter Mill Road site. J.A. 1559, 1856. An injunction action of this type against a school was unprecedented in the county. J.A. 1721.

Also unprecedented was the county's institution at this time of low-level and loud helicopter surveillance above the proposed school site and the Thoburns' nearby personal residences, an action that upset and intimidated them. J.A. 1485, 1557, 1720, 1940-41, 2035-36. County Executive Lambert claimed to know nothing about such surveillance and admitted that it "would have no value on that type of operation." J.A. 1720. County inspectors also were sent to inspect the area regularly, despite the helicopter surveillance. *Id.*

Left again with no place to conduct their religious school, the Thoburns were invited by the pastor of the Vienna Assembly of God Church to move Fairfax Christian School into the facilities operated by that church in Vienna, a town located within Fairfax County. J.A. 1560, 1666, 1833-36, 1840-41. These facilities consisted of a three-story administration and classroom structure attached to a large church sanctuary. J.A. 1562. During the summer, the church conducts a Bible school at that location. J.A. 1840-41.

To try to ensure that there would be no problem accepting the church's invitation to relocate the entire Fairfax Christian School student body in the church property, members of the Thoburn family met with Gregory Hembree, the Vienna Director of Planning and Zoning, on September 16, 1988. J.A. 1562-64, 1667, 1777-78. Mr. Hembree assured the Thoburns that, although it would be a technical violation to move the entirety of Fairfax Christian School into the church facilities right away, they could do so and the town would accommodate them by its usual procedure of noting the violation and giving them 30 days to gain the expected approval. J.A. 1668-72, 2129. The now-wary Thoburns immediately confirmed this advice in writing to Mr. Hembree and applied for the expected approval to move the entire student body of Fairfax Christian School into the Vienna Assembly of God Church. *Id.* By this time, the use of temporary facilities, uncertainty and bad publicity had decreased the student body to approximately 225 children. J.A. 1672.

The remaining Fairfax Christian School students were moved into the church on September 20, 1988, while approval from respondent Vienna Board of Zoning Appeals was pending. J.A. 1672. The next day, county officials appeared, seeking to inspect the church buildings that were occupied by Fairfax Christian School students and teachers. J.A. 1677-79, 1744-47, 2242. The inspectors were from the Fairfax County Fire Marshal's office, which was allegedly acting as the fire marshal of Vienna pursuant to an ordinance and agreement between the two jurisdictions. *Id.* They made an inspection that lasted only several minutes and issued a written order for immediate evacuation by the religious school; it cited no violations in the space provided therefor. *Id.* The government inspectors also refused to provide school officials with the reasons for their order when asked. *Id.* After a subsequent inspection, a list of alleged "violations" was provided to the school the following day, September 22. J.A. 1748-49, 3810, 3811.

Despite strenuous efforts by the school's attorney to reach an accommodation with the town and prevent another damaging suit—including offers to suspend classes voluntarily while suggested changes were made—the Thoburn family and the church pastor were sued the next day, Friday, September 23, in an action to close down the religious school's operations. J.A. 1566-67, 1750, 1841, 1860-62, 1876-77. It was an unprecedented action by Vienna. J.A. 1798-99. County attorneys worked with the town attorneys on the case. J.A. 1725-28.

Again, there was considerable negative publicity generated by statements to the press from town officials about the dangerous condition of the school. J.A. 1756-58, 1941-42. Round-the-clock efforts through the week and over the weekend were made to comply with the inspectors' notations for action, and virtually all of these items had been completed by the time of the injunction hearing. J.A. 1670, 1681, 1750-54, 1941, 2119, 2121-25, 2241, 3818-19. Nonetheless, the following Tuesday, September 27, 1988, the same county judge who had enjoined Fairfax Christian School from operating at the Hunter Mill Road site enjoined the school from operating at the Vienna Assembly of God Church. J.A. 1566, 1568.

This extraordinary prohibition was imposed despite the fact that the permitted occupancy load of the church building in which the school had been located was more than twice the number of people in the school. J.A. 1840. The "violations" on which the injunction was based came about because the county Fire Marshal's office interpreted the church's act of charity as a change in use. J.A. 1897-1903. That is, the church let an *outside* religious school occupy its property, as opposed to having its own Bible school do so, thereby causing the church to lose the grandfathered status that exempted it from building regulations promulgated after the church's completion. *Id.* Moreover, contemporaneous county records showed that the same county Fire Marshal's office had cited at least a dozen public schools as having had violations of the

same or greater seriousness and extent as the Fairfax Christian School "violations" in Vienna, but the public schools never had been evacuated; instead, they always were given time to correct the violations. J.A. 1909-10, 2090-2117, 2797-2833.

Once again, Fairfax Christian School was left with no place to conduct classes. It became even more nomadic. For two weeks, the school took its students on field trips to museums and monuments, while efforts were made to gain approval from respondent Vienna BZA to re-enter Vienna Assembly of God Church. J.A. 1566-67, 1572, 1755. After operating under a series of temporary permits for a year, the school did gain such BZA approval in May of 1989, but only for 174 students and under new restrictions. J.A. 1573-74, 1683-85, 3829.

One of these restrictions was an unprecedented and unexplained prohibition that barred Fairfax Christian School from continuing to use the church sanctuary for Bible lessons and any other instruction; inexplicably, the only thing that students and teachers could do in the church sanctuary was to use "musical instruments." *Id.* Other regular users of the sanctuary, including hundreds of people who attended Sunday services, were not prohibited from being in the sanctuary for any purpose.

During this period, the county attempted to convince Rev. Thoburn that he should locate Fairfax Christian School in a commercial or industrial area of the county, rather than in the more than 90 percent of the county that is zoned residential and in which all public schools are located. J.A. 1569-72, 1721-23, 1728-29; *see note 3, above.* The County Executive actually suggested that Fairfax Christian School be housed in a run-down, bullet-ridden vacant building in a crime- and drug-infested commercial area at Bailey's Crossroads. J.A. 1569-72, 1721-23, 2021-22. This was rejected by Rev. Thoburn as a totally inappropriate environment for young girls and boys. J.A. 1569-72. Mr. Lambert also thought that the school should be put in a commercial warehouse and

found it amusing that sending religious children to school in crime-infested commercial areas could be considered controversial. J.A. 1721-22.

In December of 1988, Rev. Thoburn submitted yet another special exception application to respondent County Board of Supervisors requesting the following uses: (1) to locate Fairfax Christian School at the Hunter Mill Road site; (2) to allow petitioner Christ College to use the Fairfax Christian School facilities there during evenings and Saturdays to teach up to 50 students college-level courses, and (3) to allow use of the school facilities for free adult literacy classes, one of Mrs. Thoburn's areas of expertise. J.A. 1576, 1627-28. A special exception for Fairfax Christian School was granted by the Board on May 8, 1989, but with severe conditions. Christ College and the adult literacy classes were prohibited by the Board, which also imposed numerous pre-conditions to final approval and occupancy of the site by the school.<sup>6</sup> J.A. 1577-88, 1633-36, 2493, 3618, 3722-23; App. at 60a-65a. As a result, as of the time of the trial and appeal below, Fairfax Christian School still had not been able to obtain permission to locate the school in any residential area of the county. Brief of Appellants at 9.<sup>7</sup>

#### **Judicial Proceedings Below**

This Court issued its decision in *Smith* on April 17, 1990. Trial of this case was scheduled to begin May 7. On April 30, petitioners filed revised proposed jury instructions that reflected *Smith*, emphasizing this Court's discussion of hybrid rights. On May 2, petitioners submitted to the trial court a "Trial Brief on the Right to the Free Exercise of Religion in Educating Children," together with a motion for leave to file the brief. The

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<sup>6</sup> Christ College was dismissed for lack of standing following the defendants' second motion to dismiss. App. at 24a-25a.

<sup>7</sup> Fairfax Christian School did begin limited operations for some students at the Hunter Mill Road site in the spring of 1991, after the appellate record below closed.

brief focused on hybrid rights as interpreted by *Smith*, including this Court's recognition of the use of the strict scrutiny balancing test in *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972). On the evening before trial, the county respondents served a motion in limine to prevent arguments and evidence relating to balancing and less-restrictive means tests, citing petitioners' *Smith* brief as the focus of their concern, and interpreting *Smith* as favorable to their position. The trial court stated that it did not wish to consider *Smith*-related issues until after hearing the evidence. J.A. 1432-35.

At the close of petitioners' trial evidence on May 9, 1990, respondents moved for a directed verdict. During the arguments on this motion, both sides relied upon *Smith* as being dispositive of their case. The petitioners argued that protection of hybrid rights required a strict scrutiny balancing test based upon facts found by the jury. J.A. 2066-67. The respondents argued that neutral laws of general applicability could no longer be challenged under the Free Exercise Clause. J.A. 2088. The respondents' directed verdict motion was granted. The trial court's five-minute oral decision did not mention *Smith* or any other case, did not posit any constitutional test (other than whether the regulations were "reasonable") and did not rule on petitioners' Establishment Clause claims at all.

In the Fourth Circuit, both sides again relied on *Smith*, arguing opposite effects. Brief of Appellants at 11, *et seq.*, Brief of Appellees at 19, *et seq.* That appeals court, in an unpublished opinion, affirmed the trial court. In doing so, it based its analysis on the erroneous finding that petitioners' "claim is based on their reading of *Sherbert v. Verner*, 374 U.S. 398 (1963)," App. at 7a, rather than *Smith* and *Yoder* on which the respondents expressly relied instead.<sup>8</sup> The Fourth Circuit did briefly address

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<sup>8</sup> Petitioners only briefly cited *Sherbert's* historical role in their briefs to the Fourth Circuit and, on information and belief, that case never was cited in oral argument. In Petitioner-Appellants'

*Smith*, but only as an inapposite criminal statute case that would have to be expanded into a non-criminal context to determine whether the petitioners' claim implicated hybrid rights. *Id.* at 8a. In this notation, the appeals court mistakenly characterized petitioners' heavy reliance on *Smith* as a mere suggestion made to the court out of a concern that the case cast doubt on petitioners' claims.<sup>9</sup>

### REASONS FOR GRANTING THE WRIT

There are three major reasons why the writ of certiorari should issue to review the profoundly erroneous decisions below that are at odds with contemporaneous religious liberty decisions of other federal and state appeals courts. First, this is a "hybrid rights" case requiring strict scrutiny. The court of appeals, despite petitioners' urgings, failed to analyze this case as a hybrid rights case, and failed to state what constitutional test or level of scrutiny should apply. Second, this case does not present a facial challenge to a generally applicable, religiously neutral law, as the court of appeals mistakenly assumed.<sup>10</sup> It presents a challenge to discretionary governmental actions, under color of law, "as applied" to petitioners. The laws in question were not enforced in a religiously neutral manner. Furthermore, they are not "generally applicable," as was the penal statute in *Smith*, because these civil laws allow for, and are enforced by, highly individualized determinations. Third, in reviewing

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Brief, a *Smith* citation to *Sherbert* was mentioned in passing only in footnote 1. In Appellants' Reply Brief, *Sherbert* was cited, at 6, as the first compelling interest test decision, and, at 12, in a parenthetical that notes that a case being relied upon had quoted *Sherbert*. Those were the only references to the case made by petitioners.

<sup>9</sup> "Appellants, perceiving that their free exercise claim might be cast into doubt by *Employment Division v. Smith*, suggest that the various actions at issue here impaired both free exercise rights and the right of parents of FCS students to educate their children as they see fit." App. at 8a.

<sup>10</sup> See note 17, below.

the granting of a directed verdict against petitioners, the court of appeals *ignored* the evidence of burden on religiously-compelled conduct that petitioners presented in the trial court. Neither of the courts below distinguished between, on the one hand, whether a burden on religious conduct had occurred and, on the other hand, whether that burden was justified by a sufficient governmental interest. These should be recognized as entirely separate questions.

### I. THERE IS A CONFLICT AMONG THE CIRCUITS ON APPLYING *SMITH* TO CIVIL LAWS AND TO “HYBRID RIGHTS” CASES

In *Smith*, this Court held that a neutral, generally applicable and otherwise valid law that proscribes socially harmful conduct ordinarily will not be open to challenge under the Free Exercise Clause alone, when that law incidentally proscribes conduct that, for some religious adherents, has religious significance.<sup>11</sup> *Smith* made it equally clear that even a challenge to a neutral, generally applicable law may well prevail when the law infringes upon a “hybrid right.” *Smith*, 110 S. Ct. at 1601-02.<sup>12</sup>

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<sup>11</sup> As shown below, this case does not involve a challenge to religiously neutral, generally applicable laws. The challenge is not to the ordinances *themselves* under which the governmental actions were taken, but to the discriminatory and burdensome way in which those ordinances were *applied* to petitioners. See Part II and note 17, below. Determination that a hybrid right exists here is nevertheless critically important to a proper analysis under *Smith*. If the existence of a hybrid right invokes *Yoder*-style strict scrutiny, even when the challenge is to a neutral, generally applicable law, strict scrutiny is a *fortiori* even more appropriate when no challenge to neutral, generally applicable laws is involved.

<sup>12</sup> While announcing a general rule against challenges to neutral, generally applicable statutes when the challenge is based on the Free Exercise Clause alone, this Court recognized two separate protected areas in which free exercise claims may prevail. The first is the “hybrid rights” protected area discussed in the accompanying text. The second protected area is where the government has in place a mechanism, as in unemployment compensation cases, for making “individualized governmental assessments.” In these, accommodations in instances of “religious hardship” are therefore possible. *Smith*, 110 S. Ct. at 1602-03. This “individualized deter-

Such a right combines "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . or the right of parents, acknowledged in *Pierce v. Society of Sisters* . . . to direct the education of their children, see *Wisconsin v. Yoder*. . . ." *Id.* at 1601 (citations omitted).<sup>13</sup>

If any case can ever involve such a hybrid right, this is the case. The suit was brought by religious missionaries who founded, administered, and taught at a religious school in order to educate their own children and other children in the word of God, by parents who were religiously motivated to send their children to that school, and by a religious student. All education at the school is based on the Bible. The uncontradicted evidence at trial showed that Fairfax Christian School serves the religious and familial needs of parents who send their children there, that no other religious school in the area meets those religious needs, and that petitioner parents could not, consistent with their religious beliefs, send their children to the Fairfax County public schools.

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mination" protected area is founded upon *Sherbert v. Verner*, 374 U.S. 398 (1963), and requires the government to engage in a compelling interest balancing test. *Id.* The governmental determinations complained of in this case—denial of special exceptions, issuance of the evacuation order, the decisions to institute legal proceedings, application of building codes through on-site inspections, and imposition of unjustified conditions in the special exceptions and occupancy permits that were issued—are all individualized determinations of this type. However, as argued to the Fourth Circuit, it should not be necessary to decide whether the principles of this second protected area are applicable, because this case so clearly involves "hybrid rights."

<sup>13</sup> This Court held that, under the *Smith* facts, there was no such "hybrid situation, but [that case presented] a free exercise claim unconnected with any communicative activity or parental right." *Smith*, 110 S. Ct. at 1602. The Court was careful to reiterate that there was no contention that the Oregon peyote law at issue in that case represented an attempt to regulate "the communication of religious beliefs, or the raising of one's children in those beliefs . . ." *Id.*

Thus, as in *Pierce* and *Yoder*, this case implicates in the most direct manner the right of parents to control the religious upbringing of their children. The conduct sought to be protected also involves—through religious exercises, prayer, teaching, and learning at the school—the communication of religious ideas and beliefs. This case therefore falls within the protection of “both lines of cases” (the “free speech” and the “parental rights” lines) recognized in *Smith* as involving hybrid rights, as to which a strict scrutiny balancing test must be applied. *Smith*, 110 S. Ct. at 1601 n.1. This Court approvingly noted the strict scrutiny standard set forth in *Yoder*:

*Yoder* said that “the Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” 406 U.S. at 233.

*Smith*, 110 S. Ct. at 1601 n.1. As in *Yoder*, any infringement on free exercise rights, when combined as a “hybrid” with parental rights or the right to communicate ideas, can be justified, if at all, only by governmental “interests of the highest order” of a kind “not otherwise served” that “overbalance legitimate claims to the free exercise of religion.”<sup>14</sup>

The court of appeals in the instant case declined to analyze and decide this case as a hybrid rights case. Instead, it offered a series of mischaracterizations of peti-

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<sup>14</sup> 406 U.S. at 215. The *Yoder* test employs concepts similar to the “compelling state interest” and “least restrictive means” tests of *Sherbert* and its progeny, although by its use of terms like “the highest order” *Yoder* appears to establish a level of scrutiny even more demanding than the *Sherbert* line of cases. Compare *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963) (“compelling state interest”); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (“least restrictive means”).

tioners' legal contentions, and then purported to apply some unknown, unstated free exercise test that requires petitioners to show that "the zoning laws or fire codes burden their exercise of religion." App. at 8a (emphasis added).<sup>15</sup>

The Fourth Circuit's failure to apply any recognized free exercise test, or even to state what test it was purporting to apply, apparently derives from its stated uncertainty as to whether the constitutional analysis in *Smith* has any application outside the realm of challenges to *criminal* statutes. The court's analysis began with the incorrect premise that petitioners' claims were "based on their [petitioners'] reading of *Sherbert v. Verner*. . . ." App. at 7a. It proceeded from there to a debatable interpretation of this Court's holding in *Smith* that is inconsistent with those in other Circuits: In *Smith*, the Fourth Circuit found, this Court "did not address . . . the continued vitality of *Sherbert* in free exercise challenges that, like this one, involve non-criminal state regulation." App. at 8a.<sup>16</sup> The court below then concluded that it need not decide "whether *Sherbert* remains good law with respect to neutral, non-criminal state regulations." *Id.* The Fourth Circuit did not even men-

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<sup>15</sup> Petitioners' challenge to these laws is "as applied," not facial. See Part II and note 17, below.

<sup>16</sup> The framework for constitutional analysis provided by *Smith* does not distinguish between criminal and civil cases. The Fourth Circuit nevertheless expressed open doubts about *Smith*'s application in non-criminal cases and declined to apply *Smith*'s analytical framework in this case. By contrast, the Second, Third, Sixth, Eighth, and Ninth Circuits squarely have recognized the applicability of *Smith* analysis in non-criminal cases. See, e.g., *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990); *Salvation Army v. New Jersey Dep't of Community Affairs*, 919 F.2d 183, 194-96 (3d Cir. 1990); *Vandiver v. Hardin County Board of Educ.*, 925 F.2d 927, 931-34 (6th Cir. 1991); *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060, at \*21-24 (8th Cir. 1991); *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305-06, rehearing en banc denied, U.S. App. LEXIS 25359 (9th Cir. 1991).

tion *Pierce, Yoder*, or any other of the free speech or parental rights cases that formed the basis for the hybrid rights protected area recognized in *Smith*, and upon which petitioners expressly predicated their appeal.

Other federal courts of appeals have not hesitated to recognize hybrid rights cases, and to analyze them as such, when, as here, facts clearly implicating hybrid rights are presented. *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060, at \*24 (8th Cir. 1991) (recognizing hybrid right based on religious free speech in zoning case); *Salvation Army v. New Jersey Dep't of Community Affairs*, 919 F.2d 183, 186, 196-201 (3d Cir. 1990) (examining hybrid claim of free exercise in conjunction with freedom of association); compare *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305-06, rehearing en banc denied, U.S. App. LEXIS 25359 (9th Cir. 1991) (recognizing *Smith* but, as did Fourth Circuit, declining to decide whether hybrid rights analysis should be applied). The courts of last resort of the states also have recognized such hybrid rights. *State v. DeLaBruere*, 154 Vt. 237, 577 A.2d 254, 261 n.8 (1990); see also *State v. Hershberger*, 462 N.W.2d 393, 396-97 (Minn. 1990) (en banc) (recognizing hybrid rights, but deciding case under the Minnesota Constitution because of "uncertain meaning" of *Smith*).

Thus, the Fourth Circuit on this issue has rendered a decision in conflict with other courts of appeals, has decided a federal question in a way that conflicts with a state court of last resort, and has decided a federal question in a way that conflicts with the applicable decision of this Court. See U.S. Supreme Court Rule 10.1(a), (c).

Petitioners also respectfully submit that the Fourth Circuit's failure to identify the constitutional test that it was applying, its characterization of petitioners' argument as relying on one line of cases on which they did not rely, while not even mentioning the line of cases on which petitioners did rely, and its failure to follow, or even employ, the analysis set forth in the leading case

decided by this Court, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Supreme Court Rule 10.1(a).

## **II. THERE IS A CONFLICT AMONG THE CIRCUITS RELATING TO "AS APPLIED" CHALLENGES BROUGHT AFTER SMITH**

One of the most fundamental defects in the analyses by both courts below is their interpretation of this case as a direct, facial challenge to zoning and building code ordinances, and apparent rejection of the concept of an "as applied" challenge, which was the point argued. Petitioners do not claim, and never have claimed in this litigation, that religious schools should be exempt from zoning or building code laws generally. Petitioners do not challenge the inherent constitutionality of the particular ordinances here involved.<sup>17</sup> Petitioners *do* claim that the unfair, discriminatory, harsh and unprecedented manner in which those ordinances and codes were *applied to* and *enforced against* petitioners has burdened their constitutional freedom to engage in religiously mandated conduct.

In their brief to the Fourth Circuit, petitioners expressly disagreed with the trial court's characterization of the issues when it found that the "regulations *themselves*" (emphasis in brief) had not "affected" petitioners' religious conduct. Brief of Appellants at 18 (quoting trial court's decision). Petitioners pointed out that "[i]t has never been the law that only requirements that *facially* discriminate against religious conduct result in a burden on that conduct." *Id.* (quoting *Yoder's* admonition, 406 U.S. at 220, that a law neutral on its face

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<sup>17</sup> Petitioners initially pled a limited facial challenge to certain statutes and ordinances, in addition to their far more extensive "as applied" challenges. However, on appeal to the Fourth Circuit, only one paragraph of petitioners' 50-page appellate brief was devoted to these limited facial challenges, and that paragraph merely noted that the trial court had failed to rule on those challenges. Brief of Appellants at 30.

may "in its application" burden the free exercise of religion). To make it even clearer that an "as applied" rather than a facial challenge was being mounted, petitioners noted that the free exercise count of their complaint was "devoted almost exclusively to alleging that the 'actions' and 'pattern of conduct' of Defendants under color of state law had the 'effect' of burdening Plaintiffs' exercise of their religious beliefs." *Id.* (quoting from Second Amended Complaint, which was reproduced at J.A. 1163-1217).<sup>18</sup>

Contrary to the refusal of the Fourth Circuit to do so, other Circuits have recognized and entertained "as applied" challenges in post-*Smith* free exercise cases. In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 352-53 (2d Cir. 1990), the Second Circuit noted that the district court had dismissed a church's facial free exercise challenges to a local land use ordinance, but had held a bench trial on the "as applied" claims. The Eighth Circuit, in a post-*Smith* prisoner free exercise case, expressly distinguished between "the validity of the policy itself" as opposed to "the way it was applied" to the plaintiff. *Salaam v. Lockhart*, 905 F.2d 1168, 1173 (8th Cir. 1990) (evaluating prisoner's free exercise claim under *Turner v. Safley*, 482 U.S. 78 (1987)).<sup>19</sup> See also

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<sup>18</sup> Petitioners' Reply Brief in the Fourth Circuit restated in the clearest terms that an "as applied" challenge was being asserted:

However, as the Plaintiff religious families have made clear, they do not have religious objections to all of the specific requirements of the zoning and building regulations at issue in this case. *They do object in the strongest possible way to the manner in which those regulations have been unjustly interpreted, discriminatorily applied, and unfairly enforced against them.*

Reply Brief at 8 (emphasis added).

<sup>19</sup> An ironic observation in this Eighth Circuit opinion indicates a need for clarifying *Smith*:

*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.

*Moore v. Trippe*, 743 F. Supp. 201 (S.D.N.Y. 1990) (post-*Smith* case recognizing free exercise cause of action for discriminatory enforcement of local zoning and building laws). Because of this conflict among the Circuits, because this Court's own applicable precedents recognize "as applied" free exercise challenges,<sup>20</sup> and because the Fourth Circuit's misconstruction of this case as a facial challenge vitiated its analysis, certiorari should be granted.

### III. THERE IS CONFUSION IN THE CIRCUITS ON WHAT CONSTITUTES A COGNIZABLE BURDEN ON RELIGIOUSLY-MOTIVATED CONDUCT

The most incomprehensible aspect of the Fourth Circuit's decision below is its central point: Petitioners had not shown a burden on religiously-motivated conduct. In part, this astonishing holding must result from a fundamental misconception of the case as a facial challenge to zoning and building code laws generally.<sup>21</sup> But peti-

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<sup>20</sup> See *Yoder*, 406 U.S. at 220. A refinement should perhaps be noted. There may be at least two different ways in which a "facially neutral" statute may, "as applied," violate free exercise or hybrid rights. The first is when a statute that does not mention religion will result *necessarily*, by the nature of the conduct compelled or prohibited, in an infringement on free exercise rights. Both *Yoder* and *Smith* are examples. The second—which is present in this case—is when a statute that does not mention religion is used by governmental officials, vested with great discretion, to single out an individual, group, or institution and impose substantial, harsh, and discriminatory burdens on their religiously-motivated conduct. Such burdens are not merely "incidental" as in *Smith*. Operating a religious school is not an activity that the government has the *per se* power to ban, as it may ban peyote use. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>21</sup> The Court of Appeals misconceived the challenges in this case as merely reflecting petitioners' "preference" to locate the school in a residential zone, where a special exception is required. App. at 9a. As indicated in the Statement of the Case, more than 90 percent of the land in Fairfax County is zoned residential and all public schools are located in residential zones. Most industrial and commercial land would not be suitable for a school. Fairfax County, with all of its land use resources, could locate only two such potential parcels

tioners provided extensive proof that the heavy-handed, discriminatory application of these laws to them by respondents burdened their religious conduct in the most severe ways.<sup>22</sup>

The respondents in this case *shut down a religious mission school*. Government officials stormed into a religious mission school, announced that classes must cease, that everyone must get out, and that school was suspended indefinitely. Then, despite pleas by school officials and attorneys to work out arrangements to keep the school functioning while government demands were being satisfied—even to allow the school to suspend classes temporarily to avoid suit—respondents nevertheless rushed to obtain a court order closing the school down. Surely, this evacuation and closure alone is ample *prima facie* evi-

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in non-residential zones, neither of which was suitable for young children. In any event, Fairfax Christian School was entitled to be treated fairly on its special exception application in Oakton, regardless of whether alternative sites might have been available.

<sup>22</sup> The Fourth Circuit opinion ignores this proof. The evidence of burden was set forth at length in the Brief of Appellants in the appeal to the Fourth Circuit, and was recapitulated in the Reply Brief. Extensive testimony on burden, with related exhibits, was contained in the Joint Appendix on that appeal.

A verdict may be directed only when—without weighing the credibility of the witnesses—there can be but one reasonable conclusion. When, as here, there is sufficient evidence in conflict so that reasonable men could reach different conclusions, a directed verdict is not proper. See *Brady v. Southern R.R.*, 320 U.S. 476, 479-80 (1943); *Lewis v. City of Irvine*, 899 F.2d 451, 455 (6th Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 562 (4th Cir. 1987) (directed verdict in second trial improper); *Garment District, Inc. v. Belk Store Servs., Inc.*, 799 F.2d 905, 906 (4th Cir.), cert. denied, 486 U.S. 1005 (1986). The trial court, and appellate court on *de novo* review, must consider the evidence in the light most favorable to the party against whom the verdict is directed, with all reasonable inferences being made in favor of that party. See, e.g., *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *Gunning v. Cooley*, 281 U.S. 90 (1930); *Garment District*, 799 F.2d at 906.

dence that religious learning, speech, and other religiously-motivated conduct had been hampered. That burden was heightened when, as here, parents of the students at that school had no other school to which they could send their children without violating their religious beliefs, but yet were required by law to send their children to school.

Shutting down a religious school should be recognized as a burden on the religiously-motivated conduct being exercised at that school, and a burden on the hybrid rights of religiously-motivated parents who send their children there. It is an entirely different question as to whether there might have been, on balance, governmental *justification* for shutting down the school and for imposing the other burdens on religious conduct cited by petitioners in this case. The answer to that question is impossible to ascertain on this record because the respondents never were put to their proof; the trial court improperly granted a directed verdict after the close of petitioners' evidence.<sup>23</sup> No one can ascertain what the government's true interests were in shutting down the school and otherwise burdening petitioners' religiously-motivated conduct—whether they were of "the highest order" or pretextual as alleged, and whether those actions were necessary or could have been "otherwise served" by less restrictive actions. In short, the court of appeals failed to make the elementary distinction between the existence of a burden on conduct, and whether that burden had been justified.<sup>24</sup>

Other types of governmental actions that were proved in this case should have been recognized by the Fourth

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<sup>23</sup> See discussion in note 22, above.

<sup>24</sup> The existence of a burden on religiously-motivated conduct is a question of fact to be determined by the fact-finder; in this case, the jury. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 871 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).

Circuit—and should be recognized by this Court—as legally cognizable burdens on religiously-motivated conduct. These include:

- The institution of an unwarranted, publicly-proclaimed action to enjoin the occupancy of a vacant religious school run by missionaries who had promised not to open it until it was approved;
- Denial on pretextual grounds of two applications to establish a religious school in a residential area;<sup>25</sup>
- Harassment of churches that housed a religious school temporarily, causing the school to lose its temporary home, with no hope of obtaining timely zoning approval for any other location under drawn-out local special exception procedures;
- Direct interference with religious observances and education, by prohibiting a religious school's use of a church's sanctuary for Bible and other lessons,

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<sup>25</sup> The reasons given on the record for denial of these two applications were thin, at best. The probable real reason is not only religious but political animosity against Robert Thoburn and his family, who had been active as conservative candidates marshaling the "religious right" electorate in Fairfax County and Virginia politics. Petitioners, had they been permitted to do so, would have introduced sworn testimony and contemporaneous written documentation that Robert and John Thoburn were approached by County Planning Commissioner Carl Sell, on behalf of defendant Board of Supervisors member Joseph Alexander, with an offer to approve the special exception for the school in 1987 if Robert Thoburn would withdraw his candidacy for the Board of Supervisors. This evidence described the date, time, and place of the meeting with Planning Commissioner Sell in detail, and contained notes of telephone conversations that John Thoburn had with representatives of the Federal Bureau of Investigation, whom he contacted immediately after this alleged political bribe was offered. Shortly after Robert Thoburn rejected this "offer," the second special exception application was denied by a 5-4 vote, with Commissioner Alexander casting the decisive negative vote. This probative evidence of improper decision-making was excluded by a pretrial motion in limine on grounds that it would be "prejudicial." J.A. 1077, 1092-96, 1119.

with no reason ever having been given for that prohibition;

- A loss of two-thirds of a religious school's students due to years of repeated zoning denials and legal and administrative harassment;
- Extensive adverse publicity and loss of goodwill for a religious school, due to false characterizations of the school officials as people who would endanger the lives of children;<sup>26</sup>
- Intimidation tactics such as the use of helicopter surveillance by government officials over the proposed site of a religious school and the homes of the missionaries who ran it;<sup>27</sup>
- Unnecessary and harmful delay in granting permission to open a religious school, including imposition of expensive and unwarranted conditions;<sup>28</sup> and
- Extensive financial losses from improper governmental actions against a religious school and those associated with it, running to approximately \$700,000 each year, exclusive of legal fees, for the two years preceding the trial.<sup>29</sup>

*Yoder* commands that, when religious rights such as those present in the instant case are infringed, courts

<sup>26</sup> When petitioners attempted to show the magnitude and severity of the newspaper campaign conducted against them by respondents, the trial court refused to allow the newspaper articles to be placed in evidence as proof of burden and damages, stating: "He has testified that there was press coverage and that had some adverse effect." J.A. 1758.

<sup>27</sup> At trial, the Assistant County Attorney boasted of the use of county helicopters for these overflights. J.A. 1485.

<sup>28</sup> The letter granting the special exception to Fairfax Christian School is reproduced at App. 60a-65a.

<sup>29</sup> J.A. 1575, 1584. In addition, Robert Thoburn sustained a loss of approximately \$2 million due to the failure of a covenant to build a Christian school on the Oakton property upon which the county twice denied him permission to build the school. J.A. 1582.

must "searchingly examine the interests that the State seeks to promote." 406 U.S. at 221. The courts below rejected this still-valid mandate and adopted a government-is-always-right rule.<sup>30</sup>

This Court, other federal courts of appeals, and state courts of last resort have recognized burdens on religious conduct under facts not remotely as compelling as those presented to the Fourth Circuit in this case. This Court has found burdens on religious conduct to exist when all that was involved was a denial of monetary *benefits* to which an individual might otherwise be entitled. *Sherbert*, 374 U.S. at 403; *Thomas*, 450 U.S. at 716-18; *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 139-40 (1987). Surely, evidence of a burden on religious conduct sufficient to survive a motion for directed verdict has been presented when the uncontested facts show the actual closure of the school, huge financial losses, severe loss of enrollment, and the pattern of intimidation and harassment described above. See also *Pierce*, 268 U.S. at 534-36 (effect on religious school's business and property, as well as effect on parents' interest in directing upbringing of children, recognized by Court).

In post-*Smith* decisions, courts of appeals also have recognized burdens on religious conduct where the interference does not even approach that presented to the

<sup>30</sup> The court of appeals' entire analysis of the building code issues was as follows:

[Petitioners] failed to establish how conforming to local fire and safety codes could impair the religious mission of FCS. As we have noted, regulations "manifestly and properly concerned only with the health, safety, and welfare of children" cannot "be held to impinge on any currently known or practiced religious beliefs under free exercise protection."

App. at 9a (citation omitted). This statement incorrectly treats petitioners' claims as a facial challenge to local fire and safety codes, and ignores the extensive evidence that was presented of the burdens created by the unjustified application of these codes. See Part II and note 17, above.

Fourth Circuit here. *United States v. Board of Educ. of Philadelphia*, 911 F.2d 882, 889 (3d Cir. 1990) (Title VII case; prohibition against school teacher's wearing religious garb burdens free exercise; any contention to the contrary "could not be seriously maintained"); *Cornerstone Bible Church v. City of Hastings*, U.S. App. LEXIS 26060 at \*5-6, \*21-24, \*28 (8th Cir. 1991) (zoning exclusion of churches from central business district; case reversed and remanded for consideration of hybrid rights claim); *State v. DeLaBruere*, 154 Vt. 237, 577 A.2d 254, 262-63 (1990) (reporting requirements imposed by state on religious school constitute a burden). In post-*Smith* cases involving prisoners' rights to religious freedom, the courts of appeals often have found the burdens justified, but nevertheless have recognized that a burden existed.<sup>31</sup> *Hunafa v. Murphy*, 907 F.2d 46 (7th Cir. 1990) (possibility that pork products on tray may "run together" with other food, thereby threatening prisoner's religiously-founded objections to eating pork, recognized as burden that may survive after *Smith*); *Salaam v. Lockhart*, 905 F.2d 1168, 1170 (8th Cir. 1990) (policy limiting name changes by prisoners admitted to infringe upon inmate's free exercise rights); *Friedman v. Arizona*, 912 F.2d 328 (9th Cir. 1990), cert. denied *sub nom. Naftel v. Arizona*, 111 S. Ct. 996 (1991) (restrictions on growing a beard).<sup>32</sup> Compare *Murray v. City of Austin*, U.S. App. LEXIS 26392, \*14 (5th Cir. 1991) (city insignia bearing Christian cross; court rejected plaintiff's argument that insignia caused burden by "subtle coercion" to adhere to the majoritarian faith; "actual inter-

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<sup>31</sup> The cited cases involve application of the tests set forth in *Turner v. Safley*, 482 U.S. 78 (1987) and in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), but were decided after *Smith*.

<sup>32</sup> Pre-*Smith* cases involving burdens on religious organizations analogous to the ones presented by this case, though less severe, include *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988), and *City of Sumner v. First Baptist Church*, 97 Wash.2d 1, 639 P.2d 1358 (1982).

ference" or "actual compulsion" is necessary (citing cases)).

#### **IV. AN OUTRAGEOUS VIOLATION OF THE ESTABLISHMENT CLAUSE SHOULD NOT BE COUNTENANCED**

Respondent Vienna Board of Zoning Appeals prohibited the Fairfax Christian School from continuing to use the sanctuary at the Vienna Assembly of God Church for anything other than "musical instruments." J.A. 3829. Because of this prohibition, religious classes, Bible study, prayers and devotions could no longer be conducted by Fairfax Christian School teachers or students in front of the cross within the most sacred area of the church. Yet, other, larger groups could use that area for Bible study, religious services and entertainment—as they had for years.

No reason for this prohibition ever was given by respondents at the time. No justification was provided at trial, except for an insensitive statement by counsel for the Town respondents that the permit's ban on religious use of a church sanctuary was like saying "you can't have your classes in the bathroom and you can't have them in the closet. If you are going to run a school, then have your classes in classrooms. That's what the permit says." J.A. 2052.

This direct interference with religious speech and worship in a holy place is a violation of all three prongs of the Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). No evidence whatsoever of secular purpose was offered, the clear and primary effect of this restriction was to inhibit religious practices, and such unjustified intrusion into the very heart of church and religious school affairs is the type of government entanglement against which the Establishment Clause is meant to protect.

The trial court admitted it could see no "logic" for this blatant restriction, but then declined to rule at all on petitioners' Establishment Clause claim. J.A. 2070-71.<sup>33</sup> The Fourth Circuit also did not address the legal and factual issues argued to it in the briefs on this Establishment Clause claim. Instead, it ritualistically stated that religious organizations are "not exempt" from "building and zoning regulations." App. at 14a. But if there was a valid zoning, health, safety, or building code interest behind this remarkable restriction, it never has been identified or proved.

### CONCLUSION

The lower courts, government agencies, and individuals seeking to exercise their religious rights need clarification of this Court's decision in *Employment Division v. Smith*. This case provides the Court with that opportunity.

Respectfully submitted,

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Dated: December 12, 1991      *Attorneys for Petitioner*

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<sup>33</sup> The sanctuary restriction was specifically pled as an Establishment Clause claim. Second Amended Complaint, J.A. 1209-10.

# **APPENDIX**



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**APPENDIX**

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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No. 90-2406

CHRIST COLLEGE, INC.; ROBERT L. THOBURN; ROSEMARY S. THOBURN; JOHN M. THOBURN; LLOYD L. THOBURN; THOBURN LIMITED PARTNERSHIP; GLENN T. DRYDEN; JUDY K. DRYDEN; DOROTHY L. THOBURN, an infant, by Lloyd L. Thoburn, her next friend,

*Plaintiffs-Appellants,*

v.

BOARD OF SUPERVISORS, FAIRFAX COUNTY; THE TOWN OF VIENNA, VIRGINIA, a Municipal Corporation; VIENNA BOARD OF ZONING APPEALS; JOSEPH ALEXANDER; SHARON BULOVA; THOMAS M. DAVIS, III; KATHERINE K. HANLEY; GERALD HYLAND; HAMILTON J. LAMBERT; ELAINE McCONNELL; AUDREY C. MOORE; MARTHA V. PENNINO; LILLA RICHARDS,

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Eastern District of Virginia, at Alexandria  
Claude M. Hilton, District Judge  
(CA-90-1131-A)

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Argued: April 8, 1991

Decided: September 13, 1991

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Before PHILLIPS, WILKINSON, and HAMILTON, Circuit Judges. Affirmed by unpublished opinion. Judge Phillips wrote the opinion, in which Judge Wilkinson and Judge Hamilton joined.

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#### COUNSEL

ARGUED: Richard J. Leighton, LEIGHTON & REGNERY, Washington, D.C., for Appellants. James Patrick Taves, Senior Assistant County Attorney, Fairfax, Virginia, for Fairfax County Appellees; Warren Hunter Britt, PARVIN, WILSON, BARNETT & HOPPER, Richmond, Virginia, for Town of Vienna Appellees.

ON BRIEF: Alfred S. Regnery, Dan M. Peterson, Susan K. Anthony, LEIGHTON & REGNERY, Washington, D.C., for Appellants. David T. Stitt, County Attorney, Mark B. Taylor, Assistant County Attorney, Fairfax, Virginia, for Fairfax County Appellees.

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Unpublished opinions are not binding precedent  
in this circuit. See I.O.P. 36.5 and 36.6.

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#### OPINION

PHILLIPS, Circuit Judge:

This is an appeal from a directed verdict by the District Court for the Eastern District of Virginia, dismissing the claims of the operator of a for-profit Christian school, and related parties, under 42 U.S.C. § 1983. Appellants contended, in essence, that they had been denied their constitutional rights to free exercise, equal protection, and substantive due process, as well as their right to be free of an established religion, as a result of their being denied permission to operate or build a schoolhouse at various locations in Fairfax County and the Town of Vienna, Virginia. Because we conclude that the various zoning and public health and safety policies at issue here

did not violate the constitutional rights of any of the appellants, we affirm.

## I

In 1961, Robert L. Thoburn and his wife, Rosemary, started the Fairfax Christian School (FCS) in what was then the town of Fairfax. Thereafter he and his various familial associates operated the school on various properties in the Northern Virginia area. FCS was moved to Fairfax County in 1964 and was located on Popes Head Road by virtue of a special permit from the County Board of Zoning Appeals (BZA). The school later received other special permits from the BZA authorizing expansion of the FCS facility. FCS was operated at this location for twenty years, by which time enrollment exceeded 500 students. In 1984, the Thoburns sold the Popes Head site for \$3 million. At the time they sold the site, the Thoburns had not made any final arrangements for relocating the school.

In February 1985, the Thoburns completed the purchase of about sixty acres of property in the Oakton area of Fairfax County. The Oakton property was zoned R-1, residential, one dwelling per acre. Although Fairfax County permits a school to operate on any property zoned for commercial or industrial use as a matter of right it requires that a school obtain a special exemption to the zoning laws before it may locate in an area zoned residential. Thoburn submitted an application for a special exemption shortly after completing the Oakton purchase, seeking permission to operate FCS on a forty acre portion of the Oakton property. The County's planning staff and the Planning Commission recommended denial of the application on several grounds, including the fact that the density of the use would violate the county's Comprehensive Plan, the application did not satisfy all applicable zoning standards, and that it proposed a major disturbance of an established Environmental Quality Corridor. Among the concerns noted was the Thoburns' plan to clear and grade large areas of the flood-

plain for the construction of ballfields. The County Board of Supervisors held a public hearing and a month later, on a 4-4 vote, rejected the application for a special exemption.

In February of 1987, Thoburn filed a second application for special exemption for the Oakton site. This new application was substantially similar to the first submission, contemplating the same ballfields across the floodplain and a similarly formidable projected school population of 576 students. Again the Fairfax County planning staff and Planning Commission recommended denial of the application. After a public hearing, the Board of Supervisors again denied the request, this time on a 5-4 vote.

In search of a temporary home for FCS after the sale of the Pope's Head property, the Thoburns leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as interim locations for the school. In early 1988, the Fairfax County Office of Assessments sent a letter to Jerusalem Baptist Church inquiring into the lease arrangements between the church and FCS.<sup>1</sup> After this inquiry regarding the church's tax-exempt status, Jerusalem Baptist decided not to renew its lease to FCS.

To provide another temporary home for the school, the Thoburns began renovating three houses they owned on Hunter Mill Road. This area was zoned R-E, residential estate, a designation which allows no more than one dwelling per two acres. Thoburn applied for, and received, residential building permits to perform this work. His plans, submitted for the purpose of receiving the building permits, showed bedrooms, living rooms, and other residential spaces, rather than classrooms. Thoburn admitted, however, that he never intended to use these renovated buildings for residential purposes but

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<sup>1</sup> Under Virginia law, tax exempt property leased for profit may not retain full tax exempt status. Va. Code § 58.1-3603.

rather intended them to function as a school facility for FCS. The modifications were performed up to the higher standards set for commercial property, however, and included installation of fire alarms, exit signs, and fire rated doors.

In late August 1988, the Fairfax County Executive learned that the Thoburns planned to open a school on the Hunter Mill Road site without obtaining a special exemption to the local zoning regulations. On September 1, 1988, the County Fire Marshal, the Building Official, and the Zoning Administrator filed suit in the county circuit court to enjoin Thoburn from opening FCS at Hunter Mill without obtaining a special exemption or in violation of the building code. After a hearing on September 13, 1988, the court enjoined the Thoburns from operating the school on the site until it received county approval. At that time, the circuit court considered free exercise and equal protection claims brought by Thoburn but concluded that no constitutional violations had occurred. Further, the court held that if the court allowed the school to operate, "the students would be placed in a hazardous situation, which would be a danger to their health, to their safety and to their welfare." The court added that the Thoburns and FCS were "responsible for creating this situation in that they have failed to comply with state and local law."

The Thoburns then decided to operate FCS in Vienna Assembly of God Church (Virginia Assembly). Virginia Assembly is located in Vienna, Virginia, which is in turn located in Fairfax County. Vienna has its own Town Council, Board of Zoning Appeals, and Zoning Ordinance. On July 20, 1988, the Town Board of Zoning Appeals approved a conditional use permit for 49 students in the Virginia Assembly basement. On September 19, 1988, the Thoburns applied for a temporary use permit for 175 more students. The next day, without having received approval of the temporary use permit application, lack-

ing occupancy approval for the initial forty nine students, and without consulting the fire marshal, the entire Fairfax Christian School was moved into the Virginia Assembly building. Two days later, a county fire technician inspected the Virginia Assembly and ordered FCS to evacuate the premises. Despite the evacuation order, FCS remained open and students continued to attend school at the Virginia Assembly site. Consequently, on September 23, the Town of Vienna sued in county circuit court to enjoin the further operation of FCS in the Virginia Assembly facility, absent necessary permits and safety approval. The school continued operation until the court finally granted an injunction against further use of the church. Two weeks later, FCS was granted temporary permission to operate at Virginia Assembly after it had substantially complied with all zoning and building code requirements. FCS received a permanent use permit for 174 students on May 17, 1989.

On December 9, 1988, the Thoburns applied for a special exemption for the Hunter Mill site. The application included a request to use the property for FCS during the day, for Christ College during evenings, and by Mrs. Thoburn for her adult literacy classes on weekends. The County planning staff recommended approval with certain conditions, and the Board of Supervisors subsequently approved the Hunter Mill special exemption on May 8, 1989 with certain limitations on the use of the property. The exemption was only approved as to FCS; the exemption did not authorize use of the site for either Christ College classes or Thoburn's adult literacy classes. In addition, the Supervisors attached certain public safety conditions to the permit which, by the fall of 1989, FCS had not yet satisfied. At the time of trial, FCS had not been able to obtain final zoning permission for the property.

The Thoburns, joined by Glenn T. and Judy K. Dryden, parents of FCS students and Christ College, as plaintiffs

then brought this action under 42 U.S.C. § 1983 against Fairfax County, the Town of Vienna, the Town Board of Zoning Appeals, and various county and Town officials alleging violations by the defendants of the plaintiffs' constitutional rights to due process, equal protection, and free exercise, as well as violations of the first amendment prohibition on the establishment of religion. After plaintiffs presented their case at trial, defendants moved for a directed verdict on all issues. The district court granted this motion and plaintiffs now appeal.

## II

Appellants' first contention is that the district court erred in directing a verdict on the free exercise issue. They argue that the zoning and fire safety policies of the county and the town impinged on their first amendment rights to the free exercise of religion. Their claim is based on their reading of *Sherbert v. Verner*, 374 U.S. 398 (1963). There, the Court held that whenever a governmental action "burdens" the free exercise of religion, the action must be justified by a compelling governmental interest. *Id.* at 402-03. The decision was ground-breaking in that it recognized for the first time that a governmental action which was facially neutral, but had the effect of impairing the free practice of religion, would receive strict scrutiny. More recently, however, the Supreme Court has begun to rethink its fundamental approach to the free exercise clause.

In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the Court held that a facially neutral criminal law which has the incidental effect of impairing free exercise of religion is not subject to *Sherbert's* rigorous compelling interest analysis. *Id.* at 1603. The Court suggested that such scrutiny might be reserved for only those criminal regulations which implicate both free exercise and some other fundamental right, such as free speech, free press, or the right of a parent to educate his

or her child. *Id.* at 1601-02. The court did not address, however, the continued vitality of *Sherbert* in free exercise challenges which, like this one, involve non-criminal state regulation.

Appellants, perceiving that their free exercise claim might be cast into doubt by *Employment Division v. Smith*, suggest that the various actions at issue here impaired both free exercise rights and the right of the parents of FCS students to educate their children as they see fit. They therefore contend that, even if we were to expand *Employment Division's* analysis into a non-criminal context, their claim is exactly the sort of hybrid still subject to strict scrutiny under *Employment Division*. We need not, however, decide whether appellant's claim is indeed a hybrid, under *Employment Division*, or even whether *Sherbert* remains good law with respect to neutral, non-criminal state regulations. We conclude that appellants failed to establish the first element in any free exercise claim: they have not proved that the zoning laws or fire codes burden their exercise of religion. We begin by considering their claims vis-a-vis the zoning provisions.

In analyzing appellants' critical failure of proof as to these, it may be helpful to hypothesize ways in which zoning laws might conceivably burden rights to the free exercise of religion through the operation and use of such schools as FCS. The most obvious way of course would be by absolutely preventing any property's use for such purpose. Fairfax County zoning provisions do not prohibit the operation of private, or parochial, schools by any such blunt means. The zoning provisions in fact permit such a school to be located in either commercial or industrial zones without any special exemption. In addition, with a special exemption, such schools may also be located within residential zones.

Beyond this most obvious way of burdening such rights, they might conceivably do so by preventing use of cer-

tain property having particular religious significance. Less conceivably, but possibly, they might do so by curtailing particular uses having special religious significance. But appellants have not shown that conformance to Fairfax's zoning regulations would in these or any other way impair any aspect of anyone's free exercise of religion. They have not shown how their rights may only be exercised in a facility located in a residential zone, nor that conforming to the special exemption requirements laid down by Fairfax would in any constitutionally significant way burden those rights.

Unquestionably, Fairfax's zoning laws made it more difficult for FCS to be located on property of the Thoburns' choice. The fact that local regulations limit the geographical options of a religious school, however, does not prove that any party's right to free exercise is thereby burdened. There must at least be some nexus between the government regulation—here, a zoning law—and impairment of ability to carry out a religious mission. It is not enough that an entity conducting a religious program or mission would prefer to locate on residential property. That preference must be linked to religious imperatives. No such link was proved here and the court was correct in concluding that the zoning regulations did not burden appellants' free exercise of religion.

Similarly, appellants failed to establish how conforming to local fire and safety codes could impair the religious mission of FCS. As we have noted, regulations "manifestly and properly concerned only with the health, safety, and welfare of children" cannot "be held to impinge on any currently known or practiced religious beliefs under free exercise protection." *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 244 (4th Cir. 1984). Lacking any such evidence on the record, we affirm the district court's decision rejecting appellants' free exercise claims.

## III

Appellants next argue that zoning exemptions were handed out in a discriminatory fashion and that denial of theirs constituted a violation of the equal protection clause. While the equal protection clause is generally reserved for challenges to governmental policies which are discriminatory on their face, such claims may be maintained even when an action is neutral on its face if the statute was motivated, in whole or in part, by a discriminatory purpose or intent. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977).

One basic fact must be proved, however, to succeed in any such equal protection challenge. A plaintiff must establish that he was subjected to discriminatory treatment vis-a-vis another similarly situated party. It is this first, essential fact that appellants were never able to establish at trial, specifically that they received different, inferior treatment in their efforts to receive zoning approval than did other similarly situated private schools. As the district court pointed out, FCS was entitled to location in commercial and industrial zones as a matter of right, and each time the Thoburns complied with the building or zoning requirements in Vienna or Fairfax, they were issued a permit to operate on residential property.

Even if appellants had been able to prove some level of disparate treatment, they were unable to establish any religious animus on the part of the town or the county. Given that the laws at issue here are facially neutral, evidence of such animus would have been essential to establish an equal protection claim. The statement of County Supervisor Alexander who cast the pivotal vote in 1987, clearly suggests, however, a lack of religious animus. He stated:

I think that the school is a good school. I think there's no question about the fact that it's a good

Christian school and we need those in this County, without any doubt, and I'm in favor of that. . . .

'The major environmental concern related to this proposed development is the lack of protection of the environmental quality corridor of Rocky Branch . . . . This development cannot be considered to be environmentally sensitive, nor does it help preserve the ecological integrity of the Difficult Run watershed'. . . .

[The Planning Commission Report] goes on to say a number of measures which would have to be taken in order to make [the FCS proposal] compatible [with the environmental concerns of the Comprehensive Plan]. None of these measures have been taken. . . .

In fact, appellants did not present any evidence at all of legislative animus toward religion or any religious group. In light of appellants' failure to establish either disparate treatment or discriminatory animus, the district court rightly ruled that their equal protection claim failed as a matter of law.

#### IV

Appellants next claim that the zoning process violated their substantive due process rights. We have held that "where there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue' a . . . permit, a Fourteenth Amendment claim is properly stated." *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989), quoting, *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983). Further, we have noted "that government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.'" *Marks*, supra at 311, quoting, *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977). In essence, the appellants must prove that the

town and county's land use decisions were "arbitrary and capricious." See *Scott*, supra, at 1420 n. 14.

Appellants principally rely on our decision in *Marks v. City of Chesapeake*, arguing that the various local officials here acted out of arbitrary dislike for FCS. *Marks* involved a palmist applying to obtain a conditional use permit. The city and its elected representatives initially supported allowance of the permit. Only after certain local citizens displayed overt religious hostility to the presence of the palmist did the city government shift positions, opposing the grant of a permit. In *Marks* it was easy to isolate the cause of the city's decision to deny the permit. Until the citizens bared their arbitrary religious hostility to the palmist, the city moved smoothly to approve a permit for him. After the citizens spoke out, the city moved equally quickly in rejecting the permit request.

This case is fundamentally different from *Marks*. The various special exemption applications in this case were reviewed thoroughly by the Fairfax land use experts. Both the Planning Commission and the professional planning staff continuously opposed granting the exemptions for the proposed uses suggested by the Thoburns. The Planning Commission offered legitimate land use explanations for their decisions: protecting environmental quality, controlling storm water runoff, maintaining population density, protecting the comprehensive plan, and preventing development so intense that it was inconsistent with the development of the adjoining area. Reviewing the transcript of the Planning Commission meeting, it is clear that the only considerations discussed were legitimate land use issues. Religion was not discussed. Similarly, the discussion at the 1987 Board of Supervisors meeting, in which the Board voted 5-4 to reject the proposal, indicates no religious animus. Supervisor Hanley explained:

The issues before us are land use issues, not religious church related issues, not political issues. This issue before us is not are schools allowed in residential areas, it is rather is this proposal appropriate in this location. . . .

I cannot in good conscience recommend that the Board allow by its discretion trough the purposeful granting use of a special exception something that we know is in violation of the master plan, that we know will do environmental damage and could set a precedent in a residential area.

This is an area where the plan recommends lower density than even the zoning allows.

Likewise, the comments of Supervisor Alexander, infra at 9, indicate that the council acted on the basis of legitimate land use considerations, not on the basis of whim, arbitrary desires, or caprice.

Based on the record at trial, therefore, appellants did not prove that their applications were denied arbitrarily or capriciously. Similarly, Vienna's actions with respect to Virginia Assembly were based on rational health and safety concerns.<sup>2</sup> Lacking evidence that plaintiffs' substantive due process rights had been violated, the court correctly granted a directed verdict on this claim.

## V

Appellants next claim that the various zoning and safety regulations violate the establishment clause because they require excessive entanglement between church and state. In dismissing all of the appellants' claims the district court did not explicitly address the establishment clause issue. Given that the court plainly granted a directed verdict with respect to all of appellant's claims, this issue is appropriately before us.

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<sup>2</sup> We also note that Vienna's decisions to enforce the safety codes at Virginia Assembly were ratified by a circuit court judge.

The Supreme Court has addressed explicitly the issue whether and how zoning and fire and safety regulations may violate the first amendment's establishment clause. As the Court stated in *Tony and Susan Alamo Foundation v. Secretary of Labor*, "the Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations." 471 U.S. 290, 305 (1985); *see also First Assembly of God v. City of Alexandria*, 739 F.2d 942, 944 (4th Cir. 1984). The Establishment Clause simply does not restrict either Fairfax or Vienna from making land use decisions, and we affirm on this issue as well.

## VI

Appellants next argue that the trial court abused its discretion by excluding relevant evidence at trial. First, they contend that the court erred in keeping out evidence comparing the siting of public schools and other governmental buildings to Fairfax County's decision rejecting the Thoburns' various special exemption applications. The court found that since the government buildings—including the public school—served different uses and were sited pursuant to different processes than FCS, the comparison was of no relevance. The court was correct in this assessment.

First, any public facility is required by law to be in substantial compliance with the Comprehensive Plan. If conformity is lacking, the Board of Supervisors must amend the Plan, following public hearings and recommendation from the Planning Commission. Second, the Board of Supervisors and Planning Commission must advertise, conduct public hearings, and approve any public facility to be added to the County's Comprehensive Plan. Notably, unlike the two buildings appellants consider most relevant to their own claims—the Government Center and Pender/Franklin Elementary School—did not conform to the Comprehensive Plan.

In addition, FCS serves a very different purpose from these government buildings. The differences between FCS and the Fairfax County Government Center are evident. FCS is also not comparable to a public elementary school. A public school must serve all children in a given geographical region. It must be located in areas reflecting the concern of geographical proximity. In addition, the Pender/Franklin Elementary site contained was not located on a floodplain or an environmental quality corridor—both significant difficulties in the FCS Oakton site. The court did not abuse its discretion in excluding evidence relating to these properties.

Appellants next complain about the exclusion of evidence relating to the land use applications of other private schools. First, they argue that evidence relating to the zoning violations of Sunrise Country Day School (SCDS) should have been admitted. SCDS is located near the proposed FCS site at Hunter Mill Road. It was found in violation of its zoning permit during the same year that Fairfax County filed suit against the Thoburns to preclude their opening of school. No suit was filed against SCDS. The district court noted that, as an operational school, SCDS was allowed time to correct zoning violations of its already approved use permit. The court found that FCS was fundamentally different in this respect, in that FCS sought to begin operation in violation of zoning regulations. This distinction was a reasonable one. The court did not abuse its discretion in excluding evidence regarding the SCDS property.

Appellants argue that evidence regarding the county's decision to provide special exemptions for Flint Hill Preparatory School and Potomac School, two other private schools, ought to have been admitted. After *voir dire*, the court found that these properties were not similarly situated with the Oakton property. With respect to Flint Hill, the court found that unlike the Oakton Property, Flint Hill (1) does not contain a floodplain; (2) is located

adjacent to commercial, industrial, and high-density residential zones; (3) is on a site planned for greater development density and (4) fronts on roads with greater traffic than the roads near the Oakton property. Similarly, the court found that unlike FCS, Potomac School: (1) was established prior to the special exemption requirements of the Zoning Ordinance; (2) did not seek permission to build ballfields in the floodplain; (3) received a special exemption conditional on the school's granting of a conservation easement; and (4) is surrounded by properties with up to six times the density of the area surrounding the Oakton property.

FCS is dissimilar from these other schools in critical respects rightly relied upon by the district court. The court did not err, therefore, in precluding evidence of the treatment accorded differently situated properties.

Appellants next argue that the court erred when it excluded the testimony of county policymakers for the purpose of determining their state of mind when they voted to deny FCS a special exemption. This claim reflects a bald reversal of strategy for appellants. Arguing for admission of this evidence below, they contended that it was necessary to show that the legislators utterly failed to take religion into account when they voted to deny the special exemption. This testimony, appellants argued, would prove their contention that, by failing to consider religious concerns in any way, the supervisors' decision to deny the special exemption did not represent the least religiously intrusive alternative and was thus in contravention of the free exercise clause. The court was disinclined to allow legislators to testify with respect to legislative intent, but the defendants stipulated to the fact that the legislators did not take religion into consideration at the time of their votes. Appellants now take a different tack, contending on appeal that this testimony should have been allowed for the purpose of proving that the legis-

lators did, in fact, take religion into account. The district court obviously did not err in declining to admit this testimony under the circumstances of its proffer at trial. Just as obviously, appellants cannot be allowed to challenge that ruling on appeal on a diametrically opposed position to the only one taken in the district court.

Appellants argue that the court erred by excluding evidence of what is known as the "Carl Sell" incident. They proffered that an eye-witness would testify that Carl Sell, Planning Commissioner for Supervisor Joseph Alexander, offered to deliver Alexander's vote in favor of a special exemption for FCS if Thoburn would, in exchange, withdraw his candidacy for county supervisor. At the time of the 1987 vote, Thoburn was running for the Republican nomination for supervisor against Nancy Falck. Shortly after this alleged discussion, Alexander cast the fifth and decisive vote denying FCS a special exemption for the Oakton property. The court excluded this evidence concluding, among other reasons, that the marginal probative value of such testimony with respect to appellants' claims would be significantly outweighed by the substantial prejudicial effect of such testimony. The court's assessment of this proffer of evidence under Rule 403 of the Federal Rules of Evidence did not constitute an abuse of discretion.

Appellants contend that the court erred by excluding evidence relating to damages and burden on religion. They sought to introduce newspaper articles, tax forms, and enrollment data to show that the zoning decisions caused bad press, steep decreases in enrollment, and a substantial decline in revenue for the school. The court justifiably excluded evidence of enrollment and income declines because it was not produced to the defendants in a timely fashion. It correctly excluded the newspaper articles as cumulative and repetitive since other witnesses testified to the same effect as the articles. These rulings did not constitute any abuse of discretion.

Appellants contend that the court erred by excluding the testimony of all their proffered experts but one. The court repeatedly requested appellants to provide the names of the experts to be used at trial, as well as interrogatory answers relating to the scope of their testimony. Appellants did not comply with the court's rulings in a timely fashion. The court therefore acted within its discretion in limiting them to only one expert. Indeed, appellants do not indicate how these experts would have made a difference to their case. The district court did not abuse its discretion in limiting appellants' proffer of expert witness testimony.

Appellants contend that the district court erred in failing to grant a new or amended scheduling order, and that the court erred in prohibiting them from deposing the county and town attorneys and in excluding their testimony at trial. Both of these orders were entered by magistrates. In both cases, FCS failed to file any objections to these orders as required by 28 U.S.C. § 636 (b) (1). The objections were therefore waived. *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Appellants argue that the court erred in failing to compel defendants to make discovery. In response to voluminous discovery requests, the defendants produced a substantial quantity of documents. Thoburn, for instance, obtained over 22,000 copies of documents from the files of Fairfax County alone. Indeed, the appellants received sufficient discovery to list approximately 1400 trial exhibits. Appellants, meanwhile, failed to proceed with discovery in a timely manner. A magistrate requested that the appellants narrow the scope of their discovery requests, but they did not do so until after the discovery period had concluded. Because the appellants received substantial discovery, and because their failure to obtain additional discovery was substantially their own responsibility, we affirm the district court's denial of their motion to compel further discovery.

Finally, appellants argue that Christ College was wrongfully dismissed as a plaintiff for lack of standing. The Thoburns had agreed to permit Christ College to conduct evening classes at the Hunter Mill Road site after that campus opened. The court found that Christ College had no lease agreement with FCS and had suffered no injury or threatened injury. We agree with the district court's conclusion that the amended complaint failed to state any injury suffered by Christ College.

*AFFIRMED*

Filed: October 28, 1991

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 90-2406  
(CA-90-1131-A)

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CHRIST COLLEGE, INC., *et al.*,  
*Plaintiffs-Appellants,*

versus

BOARD OF SUPERVISORS, FAIRFAX COUNTY, *et al.*,  
*Defendants-Appellees.*

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ORDER

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The Court amends its opinion filed September 13, 1991, as follows:

On the cover sheet, section 2, line 8—the name “J. Hamilton Lambert” is corrected to read “Hamilton J. Lambert.”

On page 6, first full paragraph, line 2—commas are added after the word “students” and the word “plaintiffs.”

On page 7, first full paragraph, lines 8-9; and on page 12, first full paragraph, line 6—the word “appellant’s” is corrected to read “appellants’.”

On page 11, line 2 of the second paragraph of the indented quotation—the word “trough” is corrected to read “through.”

On page 11, first paragraph, line 2 after the indented quotation—the word “council” is corrected to read “board.”

On page 13, first paragraph, line 2—the words “the Thoburns’ proposed uses” are added after the dash and before the words “did not conform.”

On page 13, first full paragraph, line 7—the word “contained” is deleted and the word “on” is corrected to read “in.”

Throughout the opinion, the term “special exemption” is corrected to read “special *exception*.”

For the Court—  
By Direction

/s/ John M. Greacen  
Clerk

Filed: October 31, 1991

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 90-2406  
(CA-90-1131-A)

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CHRIST COLLEGE, *et al,*  
*Plaintiffs-Appellants,*

versus

BOARD OF SUPERVISORS, *et al,*  
*Defendants-Appellees.*

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ORDER

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The Court further amends its opinion filed September 13, 1991, and amended October 28, 1991, as follows:

On the cover sheet, section 2, line 8—the appellee's name is *J. Hamilton Lambert*.

For the Court—  
By Direction

/s/ John M. Greacen  
Clerk

Filed: November 21, 1991

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 90-2406  
(CA-89-1131-A)

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CHRIST COLLEGE, *et al.*,  
*Plaintiffs-Appellants,*

versus

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, *etc., et al.*,  
*Defendants-Appellees.*

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ORDER

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The Court further amends its opinion filed September 13 and amended October 28 and October 31, 1991, as follows:

On the cover sheet, section 3, line 4—the district court number is corrected to read “CA-89-1131-A.”

For the Court—  
By Direction

/s/ John M. Greacen  
Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
  
ALEXANDRIA DIVISION

---

Civil Action No. 89-1131-A

CHRIST COLLEGE, INC., *et al.*,  
*Plaintiffs,*  
v.

THE BOARD OF SUPERVISORS OF  
FAIRFAX COUNTY, VIRGINIA, *et al.*,  
*Defendants.*

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ORDER

This matter came before the court on defendants, The Town of Vienna and Vienna Board of Zoning Appeals' Motion To Dismiss and defendants, Board of Supervisors of Fairfax County, the individual Board members, and the County Executive's Motion to Dismiss.

As to the issue of standing, the Court finds that plaintiffs Robert Thoburn, Rosemary Thoburn, John Thoburn, Lloyd Thoburn, Dorothy Thoburn, and the Thoburn Limited Partnership, have adequately alleged a threatened injury resulting from the defendants' conduct. As parents, plaintiffs Glenn and Judy Dryden have suffered a threatened injury insofar as their right to have their child attend a school compatible with their religious beliefs has been threatened. However, Christ College has no lease agreement with Fairfax Christian School, has suffered no injury or threatened injury and lacks the requisites for standing in this particular case. And for reasons stated from the bench, it is hereby;

ORDERED, that the motions to dismiss as to the standing of the plaintiffs is GRANTED with respect to Christ College and DENIED with respect to all other plaintiffs, and all other Motions To Dismiss are denied.

It is FURTHER ORDERED, that the defendants shall file an Answer to the Amended Complaint within ten (10) days.

Claude M. Hilton  
United States District Judge

Alexandria, Virginia  
October 23, 1989

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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C.A. 89-1131-A

ROBERT L. THOBURN, *et al.*,  
*Plaintiffs,*  
-vs-

THE BOARD OF SUPERVISORS OF  
FAIRFAX COUNTY, VIRGINIA, *et al.*,  
*Defendants.*

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PARTIAL TRANSCRIPT  
(Motion for Directed Verdict & Court's Rulings)

May 9, 1990

Before: Claude M. Hilton, Judge  
And a Jury

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**APPEARANCES:**

Richard J. Leighton, Dan M. Peterson and Alfred S. Regnery, Counsel for the Plaintiffs

J. Patrick Taves, Mark B. Taylor, Jill Rowe and Mark Sullivan, Counsel for the Fairfax Defendants

Warren R. Britt and John Gionfriddo, Counsel for the Vienna Defendants

\* \* \* \*

[22] THE COURT: In listening to the evidence that has come on here, there is no question that the plaintiffs'

evidence shows that the Thoburns have successfully operated a private Christian school, the Fairfax Christian School, in Fairfax for a long period of time. They have had in excess of 500 students. And in the process have managed to accumulate some land and done well in connection with doing that.

There isn't any question that their evidence shows that the Thoburns and the people involved in this school are dedicated Christian people, and they are dedicated to providing a school for Christian education and have done so.

There isn't any question that they have shown that they have had some difficulty with these school sites after the sale of their Pope's Head Road property.

However, their evidence does show, and I find that there is really no conflict in the evidence that has been [23] presented here, taking their evidence at best, they have shown that the difficulties that they have had were of their own making and choosing. They did decide to sell the Pope's Head Road property. And then while in some temporary facility looked to the Oakton property. They presented two requests for a special exception to that property. On both occasions they were denied. And in those occasions their special exception was not recommended by the staff nor the Planning Commission based on issues of traffic, and not fitting the master plan, and environment, and matters of density.

That they then turned to the Hunter Mill Road site and started renovations there on residential property, which they had every right to do. And certainly when you say that Mr. Lambert testified that they had done nothing wrong up to that point, that is exactly right. They had every right to do it. But what they couldn't do was move in without having the special exception for that property. They had to have the zoning required to move in on that piece of property.

There is then a problem with Vienna, where in the church in Vienna a permit was obtained for some 49 students to move in for a kindergarten. And thereafter,

without any consultation with the fire inspector, they moved a substantially higher number of students into that facility without the permit to do so. And, of course, that follows with an eviction because of the lack of the proper permits to move [24] in.

Now, the zoning regulations and the health and safety regulations involved in each of these situations are perfectly reasonable regulations. And I have heard no evidence, there isn't any evidence here that any of these regulations are unreasonable. I guess it is somehow argued that because they were not given an exception to the regulations, that that was somehow unreasonable. That jump is difficult to make.

I also don't find any evidence in this case that any of these regulations themselves has either attacked or affected the appellants, or these people's religious beliefs, the plaintiffs' religious beliefs or have sought to regulate their religious beliefs or their conduct. We haven't gone through a full range of testimony of the areas in which private schools can be placed in Fairfax County, but we certainly have evidence that they can be placed in commercial districts as a matter of right, and that they can be placed in residential areas by special exception. And indeed, the evidence in this case is that once the requirements were satisfied in Vienna, the occupancy permit was issued. And that once the procedures were followed on the Hunter Mill Road site, that approval was given.

There is no evidence that any of the actions that were taken in regard to this mention of animosity were directed toward any religious beliefs of the plaintiffs. The only comment that was made was that one of the supervisors had a [25] problem with Mr. Thoburn's politics. And I guess it was Mr. Robert Thoburn, I am not sure which one exactly the comment was directed at.

So, I find on the basis of the evidence that was presented here, there isn't either any regulation, any ordinance, any law of the County that affects the free exer-

cise laws or the equal protection clause or the due process clause. Certainly there has been plenty of testimony as to the due process involved in all of these hearings that were had in regard to the property.

In addition, these questions were in large measure litigated before the Circuit Court in Fairfax County, not in their entirety. The issues in this case went broader than the issues before the Circuit Court of Fairfax County, but they found there also to be no violations, and as did the Supreme Court of Virginia.

As to the Town of Vienna. There is no evidence of any policy practice. The testimony is clear that the issuance of the eviction order was a reasonable one. There is no evidence of any conspiracy in this case at all.

The only aspect of this case that causes me some difficulty, I have in my own mind the question of the reasonableness of saying you can't use the church sanctuary for a classroom. But I don't know that I get myself in the position of thinking about that or letting that even go forward [26] as to an issue to be resolved, because the testimony in this case is clear that that has not inhibited in any way the free exercise of these people to operate their school, which is in a temporary facility there and they are there on a temporary basis, has not prevented them from the free exercise of their religious teaching in that school and to carry on their classes. The testimony is that they teach the Bible, have devotions and carry on the same curriculum that they have before.

So, the evidence is that while that may seem to me to be something that you might as well use the sanctuary as well as any other classroom, I am not sure I see the logic for not doing it, but to say that that has denied them the right to free exercise, the evidence is to the contrary.

And for those reasons I am going to grant a directed verdict as to all defendants in this case. And this case will be dismissed.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

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Civil Action No. 89-1131-A

ROBERT L. THOBURN, *et al.*,  
*Plaintiffs*,  
v.

THE BOARD OF SUPERVISORS OF  
FAIRFAX COUNTY, VIRGINIA *et al.*,  
*Defendants*.

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ORDER

This matter came before the court for trial on May 7, 1990, and upon the defendants' motion for a directed verdict. For reasons stated from the bench, it is hereby

ORDERED that the defendants' motion for a directed verdict is GRANTED, and judgment is entered in favor of the defendants.

Claude M. Hilton  
United States District Judge

Alexandria, Virginia  
June 15, 1990

**CONSTITUTIONAL PROVISIONS, STATUTES  
AND ORDINANCES INVOLVED****U.S. Const. Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. Amend. XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983****Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Va. Code Ann. § 15.1-490 (1989)**

Matters to be considered in drawing and applying zoning ordinance and districts.—Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the preservation of agricultural and forestal land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the county or municipality. (Code 1950, § 15-821; Code 1950, § 15-968.4; 1962, c. 407; 1966, c. 344; 1974, c. 526; 1978, c. 279; 1981, c. 418; 1983, c. 530; 1989, cc. 447, 449.)

**Va. Code Ann. § 22.1-254 (Supp. 1991)**

Ages of children required to attend.—A. Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § 22.1-254.1.

As prescribed in the regulations of the Board of Education, the requirements of this section may also be satis-

fied by sending a child to an alternative program of study or work/study offered by a public, private, denominational or parochial school or by a public or private degree granting institution of higher education.

B. Instruction in the home of a child or children by the parent, guardian or other person having control or charge of such child or children shall not be classified or defined as a private, denominational or parochial school.

C. The requirements of this section shall not apply to any child who has obtained a high school diploma, its equivalent, or a certificate of completion, or has otherwise complied with compulsory school attendance requirements as set forth in this article.

D. The requirements of this section shall apply to any child in the custody of the Department of Youth and Family Services, or any child who may have been adjudicated as an adult, and who has not passed his eighteenth birthday. (Code 1950, § 22-275.1; 1952, c. 279; 1959, Ex. Sess., c. 72; 1968, c. 178; 1974, c. 199; 1976, cc. 681, 713; 1978, c. 518; 1980, c. 559; 1984, c. 436; 1989, c. 515; 1990, c. 797; 1991, c. 295.)

#### **Va. Code Ann. § 22.1-254.1 (Supp. 1991)**

Declaration of policy; requirements for home instruction of children.—A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved

by the Board of Education; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.

B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction as required by subsection A of this section. Any parent who moves into a school division after the school year has begun shall notify the division superintendent of his intention to provide home instruction as soon as practicable and shall comply with the requirements of this section within thirty days of such notice. The division superintendent shall notify the Superintendent of Public Instruction of the number of students in the school division receiving home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation or assessment which in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this subsection is not provided by the parent, home instruction shall cease and the parent shall make other

arrangements for the education of the child which comply with § 22.1-254.

D. For purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-257.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be apportioned among the parties by the hearing officer in a manner consistent with his findings. (1984, c. 436; 1986, c. 215; 1991, c. 306.)

#### **Va. Code Ann. § 22.1-254.2 (Supp. 1991)**

Eligibility of certain children to earn a high school equivalency certificate.—The Board of Education may establish a program of testing for general educational development through which children fifteen years of age or older who have been instructed by their parents in their home pursuant to § 22.1-254.1 for three consecutive years and who have completed such home school instruction or who have been excused from school attendance pursuant to subdivision A 2 of § 22.1-257 may earn a high school equivalency certificate. (1989, c. 225.)

#### **Va. Code Ann. § 22.1-255 (1985)**

Nonresident children.—Any person who has residing with him for a period of sixty days or more any child within the ages prescribed in § 22.1-254 whose parents or guardians reside in another state or the District of

Columbia shall be subject to the provisions of § 22.1-254 and shall pay or cause to be paid any tuition charges for such child that may be required pursuant to § 22.1-5 or shall return such child to the home of his parents or legal guardians. (Code 1950, § 22-220; 1958, c. 628; 1968, c. 178; 1976, cc. 681, 713; 1978, c. 140; 1980, c. 559.)

**Va. Code Ann. § 256 (1985)**

Children exempted from article.—A. The provisions of this article shall not apply to:

1. Children suffering from contagious or infectious diseases while suffering from such diseases;
  - 1a. Children whose immunizations against communicable diseases have not been completed as provided in § 22.1-271.2;
  2. Children under ten years of age who live more than two miles from a public school unless public transportation is provided within one mile of the place where such children live;
  3. Children between ten and seventeen years of age who live more than  $2\frac{1}{2}$  miles from a public school unless public transportation is provided within  $1\frac{1}{2}$  miles of the place where such children live;
  4. Children excused under § 22.1-257 of this article;
  5. Any child who will not have reached his sixth birthday on or before September 30 of each school year whose parent or guardian notifies the appropriate school board that he does not wish the child to attend school until the following year;
  6. Any child withdrawn from kindergarten as provided in § 22.1-3 until the school year following the withdrawal.
- B. The distances specified in paragraphs A 2 and A 3 of this section shall be measured or determined from

the entrance to the school grounds or the school bus stop nearest the entrance to the residence of such children by the nearest practical routes which are usable for walking or riding. Disease shall be established by the certificate of a reputable practicing physician in accordance with regulations adopted by the Board of Education. (Code 1950, § 22-275.3; 1959, Ex. Sess., c. 72; 1968, c. 178; 1975, c. 558; 1976, cc. 681, 713; 1978, c. 518; 1980, c. 559; 1981, c. 540; 1985, c. 407.)

**Va. Code Ann. § 22.1-257 (Supp. 1991)**

Excusing children who cannot benefit from education or whose parents conscientiously object; excusing children for reasons of health or apprehension for personal safety; court authority to order alternatives.—A. A school board:

1. May, on recommendation of the principal and the division superintendent, with the written consent of the parent or guardian, excuse from attendance at school any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school;
2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school;
3. Shall, on the recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school for such period of time as the court deems appropriate any pupil who, together with his parents, is opposed to attendance at a school by reason of concern for such pupil's health, as verified by competent medical evidence, or by reason of such pupil's reasonable apprehension for personal safety when such concern or apprehension in that pupil's specific case is determined by the court to be justified;

4. May, on recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school any pupil who, in the judgment of such court, cannot benefit from education at such school.

B. The court in reaching its determination as to whether the concern or apprehension referred to in subdivision A 3 of this section is justified shall take into consideration the recommendation of the principal and division superintendent.

C. The juvenile and domestic relations district court of the county or city, in which a pupil resides or in which charges are pending against a pupil, may require the pupil who has been charged with (i) a crime which resulted in or could have resulted in injury to others, (ii) a violation of Article 1 (§ 182.2-77 et seq.) of Chapter 5 of Title 18.2, or (iii) any offense related to possession or distribution of any Schedule I, II, or III controlled substances to attend an alternative education program, including, but not limited to, night school, adult education, or any other educational program designed to offer instruction to students for whom the regular program of instruction may be inappropriate.

D. As used in subdivision A 2 of this section, the term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code. (Code 1950, §§ 22-275.4, 22-275.4:1; 1954, c. 638; 1959, Ex. Sess., c. 72; 1968, c. 178; 1970, cc. 162, 451; 1976, c. 692; 1980, c. 559; 1991, c. 606.)

#### **Va. Code Ann. § 22.1-258 (Supp. 1991)**

Appointment of attendance officers; notification when pupil fails to report to school.—Every school board shall have power to appoint one or more attendance officers who shall be charged with the enforcement of the pro-

visions of this article. Where no attendance officer is appointed by the school board, the division superintendent shall act as attendance officer.

Whenever any pupil fails to report to school on a regularly scheduled school day and no indication has been received by school personnel that the pupil's parent or guardian is aware of the pupil's absence, a reasonable effort to notify by telephone the parent or guardian shall be made by the attendance officer, other school personnel or volunteers organized by the school administration for this purpose. School divisions are encouraged to use non-instructional personnel for this notice.

Whenever any pupil fails to report to school for five consecutive school days, and no indication has been received by school personnel that the pupil's parent or guardian is aware of the pupil's absence, and a reasonable effort to notify the parent or guardian has failed, the school principal or his designee shall notify the parent or guardian by letter that such parent or guardian is requested to advise the school in writing of the reason for the pupil's absence or to accompany the pupil upon his return to school to explain the reason for his absence. Upon the failure of the parent or guardian to so advise the school or to return the child to school within three days of the date of the notice, the school principal or his designee shall notify the attendance officer or the division superintendent, as the case may be, who shall enforce the provisions of this article.

However, nothing in this section shall be construed to limit in any way the authority of any attendance officer or division superintendent to seek immediate compliance with the compulsory school attendance law as set forth in this article.

Attendance officers, other school personnel or volunteers organized by the school administration for this purpose shall be immune from any civil or criminal liability in

connection with the notice to parents of a pupil's absence or failure to give such notice as required by this section. (Code 1950, § 22-275.16; 1959, Ex. Sess., c. 72; 1980, c. 559; 1985, c. 482; 1990, c. 797; 1991, c. 295.)

**Va. Code Ann. § 22.1-259 (1985)**

Teachers to keep daily attendance records.—Every teacher in every school in the Commonwealth shall keep an accurate daily record of attendance of all children in accordance with regulations prescribed by the Board of Education. Such record shall, at all times, be open to any officer authorized to enforce the provisions of this article who may inspect or copy the same and shall be admissible in evidence in any prosecution for a violation of this article as *prima facie* evidence of the facts stated therein. (Code 1950, §§ 22-209, 22-275.15; 1959, Ex. Sess., c. 72; 1964, c. 119; 1968, c. 178; 1980, c. 559.)

**Va. Code Ann. § 22.1-260 (Supp. 1991)**

Report of children enrolled and not enrolled.--A. Within ten days after the opening of the school, each public school principal shall report to the division superintendent:

1. The name, age and grade of each pupil enrolled in the school, and the name and address of the pupil's parent or guardian; and
2. To the best of the principal's information, the name of each child subject to the provisions of this article who is not enrolled in school with the name and address of the child's parent or guardian.

B. For the purposes of this section, each student shall present a federal social security number within ninety days of his enrollment. The Board of Education shall, after consulting with the Social Security Administration, promulgate guidelines for determining which individuals are eligible to obtain social security numbers. In any case

in which an individual is ineligible, pursuant to these guidelines, to obtain a social security number, the superintendent or his designee may waive this requirement. (Code 1950, §§ 22-275.8, 22-275.9; 1959, Ex. Sess., c. 72; 1980, c. 559; 1987, c. 374; 1988, c. 163.)

**Va. Code Ann. § 22.1-261 (1985)**

Division superintendent to make list of children not enrolled; duties of attendance officer.—The division superintendent shall check the reports submitted pursuant to § 22.1-260 with the last school census and with reports from the State Registrar of Vital Records and Health Statistics. From these reports and from any other reliable source the division superintendent shall, within five days after receiving all reports submitted pursuant to § 22.1-260, make a list of the names of children who are not enrolled in any school and who are not exempt from school attendance. It shall be the duty of the attendance officer to investigate all cases of nonenrollment and, when no valid reason is found therefor, to notify the parent, guardian or other person having control of the child to require the attendance of such child at the school within three days from the date of such notice. (Code 1950, § 22-275.10; 1959, Ex. Sess., c. 72; 1980, c. 559.)

**Va. Code Ann. § 22.1-262 (Supp. 1991)**

Complaint to court when parent fails to comply with law.—A list of persons so notified shall be sent by the attendance officer to the appropriate school principal. If the parent, guardian, or other person having control of the child fails to comply with the law within the time specified in the notice, it shall be the duty of the attendance officer to make complaint in the name of the Commonwealth before the juvenile and domestic relations district court. In addition thereto, such child may be proceeded against as a child in need of services or a child in need of supervision as provided in Chapter 11 (§ 16.1-

226 et seq.) of Title 16.1. (Code 1950, § 22-275.11; 1959, Ex. Sess., c. 72; 1976, c. 98; 1980, c. 559; 1990, c. 797; 1991, c. 295.)

**Va. Code Ann. § 22.1-263 (Supp. 1991)**

Violation constitutes misdemeanor.—Any person violating the provisions of either §§ 22.1-254, 22.1-255, or § 22.1-267 shall be guilty of a Class 4 misdemeanor. (Code 1950, § 22-275.5; 1959, Ex. Sess., c. 72; 1976, c. 283; 1980, c. 559; 1990, c. 797, 1991, c. 295.)

**Va. Code Ann. § 22.1-264 (1985)**

Misdemeanor to make false statements as to age.—Any person who makes a false statement concerning the age of a child between the ages set forth in § 22.1-254 for the purpose of evading the provisions of this article shall be guilty of a Class 4 misdemeanor. (Code 1950, § 22-275.18; 1959, Ex. Sess., c. 72; 1968, c. 178; 1976, cc. 283, 681, 713; 1980, c. 559.)

**Va. Code Ann. § 22.1-265 (Supp. 1991)**

Inducing children to absent themselves.—Any person who induces or attempts to induce any child to be absent unlawfully from school or who knowingly employs or harbors, while school is in session, any child absent unlawfully shall be guilty of a Class 4 misdemeanor and may be subject to the penalties provided by subdivision 5 a of subsection B of § 16.1-278.5 or § 18.2-371. (Code 1950, § 22-275.19; 1959, Ex. Sess., c. 72; 1976, c. 283; 1980, c. 559; 1990, c. 797; 1991, cc. 295, 534.)

**Va. Code Ann. § 22.1-266 (1985)**

Law-enforcement officers and truant children.—Notwithstanding the provisions of § 16.1-246 of this Code, any law-enforcement officer as defined in § 9-169 of this Code or any attendance officer may pick up any child who is reported to be truant from school by a school principal or

division superintendent or who the law-enforcement officer or attendance officer reasonably determines, by reason of the child's age and circumstances, is truant from school and may deliver such child to the appropriate school and personnel thereof without charging the parent or guardian of such child with a violation of any provision of law. (Code 1950, § 22-275.11:1; 1976, c. 692; 1978, c. 215; 1980, c. 559.)

**Va. Code Ann. § 27-101 (Supp. 1991)**

Injunction upon application.—Every court having jurisdiction under existing or any future law is empowered to and shall, upon the application of the local enforcing agency or State Fire Marshal, issue either a mandatory or restraining injunction in aid of the enforcement of, or in prevention of the violation of, any of the provisions of this law or any valid rule or regulation made in pursuance thereof. The procedure for obtaining any such injunction shall be in accordance with the laws then current governing injunctions generally except that the enforcing agency shall not be required to give bond as a condition precedent to obtaining an injunction. (1986, c. 429.)

**Va. Code Ann. § 58.1-3603 (1991)**

Exemptions not applicable when building is source of revenue.—A. Whenever any building or land, or part thereof, exempt from taxation pursuant to this chapter and not belonging to the Commonwealth is leased or is otherwise a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town. When a part but not all of any such building or land, however, is leased or otherwise is a source of revenue or profit, and the remainder of such building or land is used by any organization exempted from taxation pursuant to this chapter for its purposes, only such portion as is so leased or is otherwise a source of profit or revenue shall be liable for taxation.

B. In assessing any building and the land it occupies pursuant to subsection A, the assessing officer shall only assess for taxation that portion of the property subject to any such lease or otherwise a source of profit or revenue and the tax shall be computed on the basis of the ratio of the space subject to any such lease or otherwise a source of profit or revenue to the entire property. When any such property is leased for portions of a year the tax shall be computed on the basis of the average use of such property for the preceding year. (Code 1950, §§ 58-14, 58-16; 1950, p. 659; 1984, c. 675.)

**Vienna, Va., Town Code § 7-14 (1988)**

*Office Created; Appointment; Powers and Duties Generally; Compensation.*

The office of the Town Fire Marshal is hereby created. The Town Council shall appoint a Fire Marshal whose powers and duties shall be set forth in this Chapter. He shall receive such annual salary as the Town Council may allow. Until such time as a Fire Marshal is appointed hereunder, the Fire Marshal of the County shall have authority to enforce provisions of this Chapter, such authority terminating upon the appointment of a Fire Marshal by the Council as provided herein.

**Vienna, Va., Town Code § 7-19 (1988)**

*Enforcement of the Virginia Statewide and Town of Vienna Fire Prevention Codes.*

The Town of Vienna shall enforce the Virginia Statewide Fire Prevention Code promulgated by the Board of Housing and Community Development of the Commonwealth of Virginia pursuant to Section 27-98 of the Code of Virginia. The provisions of the Virginia Statewide Fire Prevention Code and the Fire Prevention Code of the Town of Vienna, Virginia shall be enforced by the Town Fire Marshal, the Deputy Town Fire Marshal, and members of the Fire Marshal's staff. The Fire Marshal,

the Deputy Fire Marshal, and members of the Fire Marshal's staff shall have all of the powers of the local fire official and the local arson investigator and the local fire marshal and his assistants set forth in Title 27 of the Code of Virginia, and all of the powers of the fire official and the enforcing agency set forth in the Virginia State-wide Fire Prevention Code and the Fire Prevention Code of the Town of Vienna, Virginia.

**Fairfax County, Va., Zoning Ordinance, Article 3  
(Reprint 1988) (excerpts)**

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**RESIDENTIAL DISTRICT REGULATIONS**

**PART I 3-100 R-1 RESIDENTIAL DISTRICT,  
ONE DWELLING UNIT/ACRE**

**3-101 Purpose and Intent**

The R-1 District is established to provide for single family detached dwellings at a density not to exceed one (1) dwelling unit per one (1) acre; to allow other selected uses which are compatible with the low density residential character of the district; and otherwise to implement the stated purpose and intent of this Ordinance.

**3-102 Permitted Uses**

1. Accessory uses and home occupations as permitted by Article 10.
2. Agriculture, as defined in Article 20.
3. Dwellings, single family detached.
4. Public uses.

**3-103 Special Permit Uses**

For specific Group uses, regulations and standards, refer to Article 8.

1. Group 2—Interment Uses.
2. Group 3—Institutional Uses.
3. Group 4—Community Uses.
4. Group 5—Commercial Recreation Uses, limited to:

- A. Commercial swimming pools, tennis courts and similar courts
- 5. Group 6—Outdoor Recreation Uses.
- 6. Group 7—Older Structures.
- 7. Group 8—Temporary Uses.
- 8. Group 9—Uses Requiring Special Regulation, limited to:
  - A. Barbershops or beauty parlors as a home occupation
  - B. Home professional offices
  - C. Sawmilling of timber
  - D. Veterinary hospitals
  - E. Accessory dwelling units

### **3-104 Special Exception Uses**

For specific Category uses, regulations and standards, refer to Article 9.

- 1. Category 1—Light Public Utility Uses.
- 2. Category 2—Heavy Public Utility Uses, limited to:
  - A. Electrical generating plants and facilities
  - B. Landfills
  - C. Water purification facilities
- 3. Category 3—Quasi-Public Uses, limited to:
  - A. Colleges, universities
  - B. Cultural centers, museums and similar facilities
  - C. Housing for the elderly
  - D. Institutions providing housing and general care for the indigent, orphans and the like

- E. Medical care facilities, except nursing facilities which have a capacity of less than fifty (50) beds
  - F. Private clubs and public benefit associations
  - G. Quasi-public parks, playgrounds, athletic fields and related facilities
  - H. Child care centers and nursery schools which have an enrollment of 100 or more students daily
  - I. Private schools of general education which have an enrollment of 100 or more students daily
  - J. Private schools of special education which have an enrollment of 100 or more students daily
  - K. Alternate uses of public facilities
  - L. Dormitories, fraternity/sorority houses, rooming/boarding houses, or other residence halls
- 4. Category 4—Transportation Facilities.
  - 5. Category 5—Commercial and Industrial Uses of Special Impact, limited to:
    - A. Commercial off-street parking in Metro Station areas as a temporary use
    - B. Establishments for scientific research and development
    - C. Funeral chapels
    - D. Marinas, docks and boating facilities, commercial
    - E. Offices
    - F. Plant nurseries

**3-105 Use Limitations**

1. No sale of goods or products shall be permitted, except as accessory and incidental to a permitted, special permit or special exception use.
2. All uses shall comply with the performance standards set forth in Article 14.
3. Cluster subdivisions may be permitted in accordance with the provisions of Sect. 9-615.

**3-106 Lot Size Requirements**

1. Minimum district size for cluster subdivisions: 5 acres
2. Average lot area: No Requirement
3. Minimum lot area
  - A. Conventional subdivision lot: 36,000 sq. ft.
  - B. Cluster subdivision lot: 25,000 sq. ft.
4. Minimum lot width
  - A. Conventional subdivision lot:
    - (1) Interior lot—150 feet
    - (2) Corner lot—175 feet
  - B. Cluster subdivision lot:
    - (1) Interior lot—No Requirement
    - (2) Corner lot—125 feet
5. The minimum district size requirement presented in Par. 1 above may be waived by the Board in accordance with the provisions of Sect. 9-610.

**3-107 Bulk Regulations**

1. Maximum building height
  - A. Single family dwellings: 35 feet
  - B. All other structures: 60 feet

2. Minimum yard requirements

A. Single family dwellings

(1) Conventional subdivision lot

(a) Front yard: 40 feet

(b) Side yard: 20 feet

(c) Rear yard: 25 feet

(2) Cluster subdivision lot

(a) Front yard: 30 feet

(b) Side yard: 12 feet, but a total minimum of 40 feet

(c) Rear yard: 25 feet

B. All other structures

(1) Front yard: Controlled by a  $50^\circ$  angle of bulk plane, but not less than 40 feet

(2) Side yard: Controlled by a  $45^\circ$  angle of bulk plane, but not less than 20 feet

(3) Rear yard: Controlled by a  $45^\circ$  angle of bulk plane, but not less than 25 feet

3. Maximum floor area ratio: 0.15 for uses other than residential

**3-108 Maximum Density**

One (1) dwelling unit per acre

**3-109 Open Space**

In subdivisions approved for cluster development, 20% of the gross area shall be open space

**3-110 Additional Regulations**

1. Refer to Article 2, General Regulations, for provisions which may qualify or supplement the regulations presented above.
2. Refer to Article 11 for off-street parking, loading and private street requirements.
3. Refer to Article 12 for regulations on signs.
4. Refer to Article 13 for landscaping and screening requirements.
5. Refer to Article 17 for uses and developments which require the submission of a site plan.

**Fairfax County, Va., Zoning Ordinance, Article 9  
(Reprint 1988; Supp. No. 24, 1989) (excerpts)**

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**SPECIAL EXCEPTIONS**

**PART 3 9-300 CATEGORY 3 QUASI-PUBLIC USES**

**9-301 Category 3 Special Exception Uses**

1. Colleges, universities.
2. Conference centers and retreat houses, operated by a religious or non-profit organization.
3. Cultural centers, museums and similar facilities.
4. Housing for the elderly.
5. Institutions providing housing and general care for the indigent, orphans and the like.
6. Medical care facilities, except nursing facilities which have a capacity of less than fifty (50) beds.
7. Private clubs and public benefit associations.
8. Quasi-public parks, playgrounds, athletic fields and related facilities.
9. Sports arenas, stadiums as a principal use.
10. Child care centers and nursery schools which have an enrollment of 100 or more students daily.
11. Private schools of general education which have an enrollment of 100 or more students daily.
12. Private schools of special education which have an enrollment of 100 or more students daily.
13. Alternate uses of public facilities.
14. Dormitories, fraternity/sorority houses, rooming/boarding houses, or other residence halls provid-

ing off-campus residence for more than four (4) unrelated persons who are students, faculty members, or otherwise affiliated with an institution of higher learning.

**9-302 Districts in Which Category 3 Uses  
May Be Located**

1. Category 3 uses may be permitted by right in the following districts:

PDH, PDC Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 when represented on an approved development plan

PRC District: All uses when represented on an approved development plan

C-1, C-2, C-3, C-4 Districts: Limited to uses 10, 11 and 12

C-5, C-6, C-7, C-8 Districts: Limited to uses 11 and 12

I-I District: Limited to uses 10 and 11

I-1, I-2, I-3, I-4, I-5 Districts: Limited to uses 10, 11 and 12

I-6 District: Limited to uses 10 and 11

2. Category 3 uses may be allowed by special exception in the following districts:

R-A, R-P Districts: Limited to uses 8, nursery schools, 11 and 13

R-C District: Limited to uses 3, 5, 8, nursery schools, 11, 13 and 14

R-E, R-1 Districts: Limited to uses 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14

All other R Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14

C-1, C-2, C-3, C-4 Districts: Limited to uses 1, 2, 3, 4, 5, 6, 7, 8, 13 and 14

C-5, C-6 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 10, 13 and 14

C-7, C-8 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 13 and 14

I-I District: Limited to uses 10 and 11

I-1 District: Limited to uses 1, 2, 3, 6, 7, 8, 10, 11, 13 and 14

I-2, I-3 Districts: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 14

I-4 District: Limited to uses 1, 2, 3, 6, 7, 8, 9, 10, 11 and 13

I-5, I-6 Districts: Limited to uses 7, 8, 9, 10, 11 and 13

### **9-303 Additional Submission Requirements**

In addition to the submission requirements set forth in Sect. 011 above, all applications for Category 3 uses shall be accompanied by the following items:

1. For public uses, a certified copy of the law, ordinance, resolution or other official act adopted by the governmental entity proposing the use, authorizing the establishment of the proposed use at the proposed location, shall be provided.
2. For public uses, a statement by an official or officer of the governmental body shall be presented giving the exact reasons for selecting the particular site as the location for the proposed facility.
3. All applications for medical care facilities shall be filed at the same time as the application for a State Medical Facilities Certificate of Public Need. The application for the special exception shall be referred to the Health Care Advisory Board for a recommendation and report, which shall be developed in accordance with the provisions of Par. 1 and 2 of Sect. 308 below and furnished to the Planning Commission and Board of Supervisors.

**9-304 Standards for All Category 3 Uses**

In addition to the general standards set forth in Sect. 006 above, all Category 3 special exception uses shall satisfy the following standards:

1. For public uses, it shall be concluded that the proposed location of the special exception use is necessary for the rendering of efficient governmental services to residents of properties within the general area of the location.
2. Except as may be qualified in the following Sections, all uses shall comply with the lot size requirements of the zoning district in which located.
3. Except as may be qualified in the following Sections, all uses shall comply with the bulk regulations of the zoning district in which located; however, subject to the provisions of Sect. 9-607, the maximum building height for a Category 3 use may be increased.
4. All uses shall comply with the performance standards specified in the zoning district in which located.
5. Before establishment, all uses shall be subject to the approval of a site plan prepared in accordance with the provisions of Article 17.

**9-309 Additional Standards for Child Care Centers and Nursery Schools as Set Forth in Par. 10 of Sect. 301 Above**

1. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area shall be of such size that 100 square feet of usable outdoor recreation area shall be provided for each child that may use the space at any one time. Such area

shall be delineated on a plat submitted at the time the application is filed.

For the purpose of this provision, usable outdoor recreation area shall be limited to:

- A. That area not covered by buildings or required off-street parking spaces.
  - B. That area outside the limits of the minimum required front yard, unless specifically approved by the Board in commercial and industrial districts only.
  - C. Only that area which is developable for active outdoor recreation purposes.
  - D. An area which occupies no more than eighty (80) percent of the combined total areas of the required rear and side yards.
2. For each person enrolled, indoor recreation space shall be provided in accordance with the provisions of Chapter 30 of The Code.
  3. All such uses shall be located so as to have direct access to an existing or programmed public street of sufficient right-of-way and cross-section width to accommodate pedestrian and vehicular traffic to and from the use as determined by the Director. To assist in making this determination, each applicant, at the time of application, shall provide an estimate of the maximum expected trip generation, the distribution of these trips by mode and time of day, and the expected service area of the facility. As a general guideline, the size of the use in relation to the appropriate street type should be as follows, subject to whatever modification and conditions the Board deems to be necessary or advisable:

Number of Persons	Street Type
4-75	Local
76-660	Collector
660 or more	Arterial

4. All such uses shall be located so as to permit the pick-up and delivery of all persons on the site.
5. No such use shall be permitted unless it is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

**9.310 Additional Standards for Private Schools of General Education and Private Schools of Special Education as Set Forth in Par. 11 and Par. 12 of Sect. 301 Above**

- 1. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area for a private school of general education shall be of such size that:
  - A. 200 square feet of usable outdoor recreation area shall be provided for each child in grades K-3 that may use the space at any one time, and
  - B. 430 square feet of usable outdoor recreation area shall be provided for each child in grades 4-12 that may use the space at any one time.

Such usable outdoor recreation area shall be delineated on a plat submitted at the time the application is filed.

For the purpose of this provision, usable outdoor recreation area shall be limited to:

- A. That area not covered by buildings or required off-street parking spaces.
  - B. That area outside the limits of the required front yard.
  - C. Only that area which is developable for active outdoor recreation purposes.
  - D. An area which occupies no more than eighty (80) percent of the combined total areas of the required rear and side yards.
2. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area of a private school of special education shall be based upon a determination made by the Board; provided, however, that the proposed use conforms with the provisions set forth in Sect. 304 above.
  3. For each person enrolled, indoor recreation space shall be provided in accordance with the provisions of Chapter 30 of The Code.
  4. The provisions set forth in Par. 3, 4 and 5 of Sect. 309 above shall also apply to private schools of general education and private schools of special education.

**May 19, 1989, Letter from Theodore Austell, III,  
Clerk to the Board of Supervisors,  
to Robert L. Thoburn**

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[SEAL]

COMMONWEALTH OF VIRGINIA  
COUNTY OF FAIRFAX  
4100 Chain Bridge Road  
Fairfax, Virginia 22030

May 19, 1989

Mr. Robert L. Thoburn  
1636 Crowell Road  
Vienna, Virginia 22180

Re: Special Exception  
Number SE 88-C/D-098

Dear Mr. Thoburn:

At a regular meeting of the Board of Supervisors held on May 8, 1989, the Board approved Special Exception Number SE 88-C/D-098, in the name of Robert L. Thoburn T/A Fairfax Christian School, located at Tax Map 18-3 ((3)) 2, 3, 4A; 18-3 ((1)) 4, and 5 for a private school of general education and a caretaker's residence as an accessory use pursuant to Section 3-E04 of the Fairfax County Zoning Ordinance, by requiring conformance with the following development conditions:

1. This Special Exception is granted for and runs with the land indicated in this application and is not transferable to other land.
2. This Special Exception is granted only for the purpose(s), structure(s) and/or use(s) indicated on the Special Exception Plat approved with the application, as qualified by these development conditions.
3. This Special Exception is subject to the provisions of Article 17, Site Plans. A site plan shall

be submitted for approval. Any plan submitted pursuant to this Special Exception shall be in substantial conformance with the approved Special Exception Plat and these conditions.

4. The maximum daily enrollment of students in grades K-12 shall be limited to 310, with not more than forty (40) of those students being under the age of five (5) years.
5. The normal hours of operation of the private school shall be limited to 7:00 a.m. to 6:00 p.m. Monday through Friday. Occasional special events related to the school and community serving events may be conducted outside the normal hours of operation.
6. The structures at 1620, 1624 and 1628 Hunter Mill Road (Parcels 2, 3, and 4) shall be used for classroom and administrative purposes only; the structure at 1630 Hunter Mill Road (Parcel 5) shall be limited to the caretakers residence; the structure at 10700 Sunset Hills Road (Parcel 4A) shall be limited to school administration purposes. The occupancy load for each structure shall meet Health Department requirements for septic service.
7. The applicant shall obtain all required permits and inspections prior to occupying the structures at 1620, 1624, and 1628 Hunter Mill Road for classroom and administrative purposes and the structure at 10700 Sunset Hills Road for school administration purposes. The applicant shall remove walls, or portions of walls, as may be deemed necessary by the Director of the Department of Environmental Management, in order that work previously performed without proper permits may be inspected for conformance with applicable codes.

8. Development shall be strictly limited to that shown on the Special Exception Plat dated December 1988 except that connections may be provided between existing travelways and parking area pursuant to Proposed Development Condition #13.
9. Erosion and sediment control shall be provided and maintained in accordance with provisions of Chapter 14 of the Fairfax County Code and the *Public Facilities Manual* as determined by the Director of the Department of Environmental Management. All denuded areas including the soccer field, multi-use court, play areas and septic fields, shall be stabilized and permanently maintained in ground cover as required by the Code.
10. Stormwater management shall be provided on-site to the satisfaction of the Department of Environmental Management.
11. Limits of clearing and grading shall not extend beyond what is cleared and graded, including; buildings, shaded areas, soccer field, multi-purpose court, tot lot, septic fields, and play field, as indicated on the Special Exception Plat dated December 1988.
12. A single consolidated entrance for 1624 and 1628 Hunter Mill Road shall be provided in a location and to a standard acceptable to the Virginia Department of Transportation (VDOT). The entrance at 1620 Hunter Mill Road shall remain open only to serve the nine (9) parking spaces, as indicated on the Special Exception Plat dated December 1988. Emergency access acceptable to the Fire Marshal shall be provided to 1620, 1624 and 1628 Hunter Mill Road.

13. A left-turn deceleration lane northbound on Hunter Mill Road, into the consolidated entrance referenced in the preceding condition, shall be provided to VDOT standards.
14. The septic field on the northern portion of the site shall be installed with a twenty-five (25) foot setback from the northern property boundary. Existing vegetation shall be retained within this setback.
15. In accordance with Chapter 30, Section 1-4, Par. B, "There shall be twenty (20) square feet of classroom space per child, exclusive of bathrooms, lockers, kitchens, storage and isolation rooms."
16. Thirty-five (35) permanent parking spaces, as designated on the Special Exception Plat dated December 1988, shall be provided on-site and shall be designed and striped according to the Fairfax County Public Facilities Manual. Ten (10) of these parking spaces shall be designated for the drop off/pick up of children. A sign to that effect shall be erected in a location to be approved by the Department of Environmental Management.
17. The structures at 1620, 1624 and 1628 Hunter Mill Road shall be connected to public water, as approved by the Department of Environmental Management, and the existing wells abandoned and capped in accordance with the applicable County codes.
18. The structures at 1620, 1624, and 1628 Hunter Mill Road shall be served by a Type 1 or Type 2 sewage disposal system, as approved by the Department of Environmental Management and the Health Department.

19. School lunches shall not be prepared on site. Food preparation on-site shall be limited to snacks.
20. At least sixty (60) per cent of the student enrollment shall be bused to the private school.
21. Appropriate Fairfax County personnel shall be permitted on-site during operational hours for the purpose of inspecting for compliance with these Special Exception conditions.

This approval, contingent on the above noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or adopted standards. The applicant shall be himself responsible for obtaining the required Non-Residential Use Permit through established procedures, and this Special Exception shall not be valid until this has been accomplished.

Under Section 9-015 of the Zoning Ordinance, this Special Exception shall automatically expire, without notice, eighteen (18) months after the approval date of the Special Exception unless the activity authorized has been established, or unless construction has commenced, and is diligently pursued, or unless additional time is approved by the Board of Supervisors because of the occurrence of conditions unforeseen at the time of the approval of this Special Exception. A request for additional time shall be justified in writing, and must be filed with the Zoning Administrator prior to the expiration date.

The Board also directed that staff expedite the site plan processing.

In addition, the Board 1) modified the transitional screening requirement; and 2) waived the barrier requirement to that shown on the Special Exception Plat.

If you have any questions concerning this Special Exception, please give me a call.

Sincerely,

/s/ **Theodore Austell, III**  
**THEODORE AUSTELL, III**  
Clerk to the Board of  
Supervisors (Acting)

TAIII/ns

cc: Joseph T. Hix  
Real Estate Division, Assessments  
Gilbert R. Knowlton, Deputy  
Zoning Administrator  
Donald D. Smith  
Permit, Plan Review Branch  
Seldon H. Garnet, Chief  
Inspection Services Division  
Building Plan Review Branch  
Barbara A. Byron, Director  
Zoning Evaluation Division  
Robert Moore, Transportation Planning Division,  
Office of Transportation  
Kathy Ichter, Transportation Road Bond Division,  
Office of Transportation  
Department of Environmental Management  
A. V. Bailey, Resident Engineer  
Virginia Department of Transportation  
Richard Jones, Manager, Land Acquisition &  
Planning Division  
Fairfax County Park Authority

Supreme Court, U.S.

FILED

JAN 14 1992

OFFICE OF THE CLERK

(2)  
IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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CHRIST COLLEGE, INC., et al.,  
Petitioners,

v.

BOARD OF SUPERVISORS OF  
FAIRFAX COUNTY, VIRGINIA, et al.,  
Respondents.

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Petition For Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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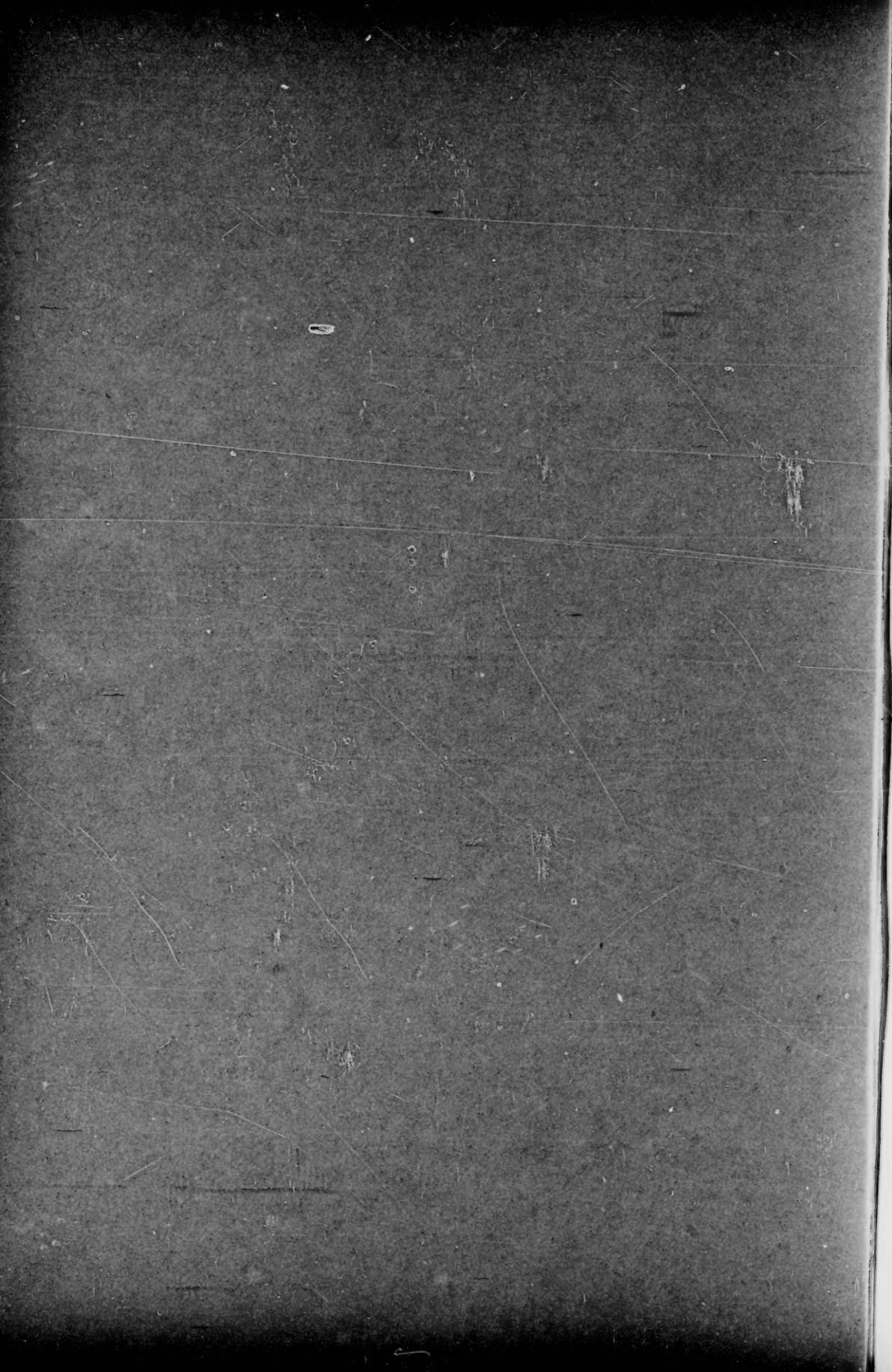
BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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ROBERT LYNDON HOWELL  
Acting County Attorney

J. PATRICK TAVES  
Senior Assistant County Attorney  
Counsel of Record for County Respondents

MARK B. TAYLOR  
Assistant County Attorney  
4100 Chain Bridge Road  
Fairfax, Virginia 22030  
(703) 246-2421



## QUESTIONS PRESENTED

1. Whether parties who concede the constitutionality of government zoning and building code regulations and fail to prove any religious animus or discriminatory treatment based on religious beliefs have a viable free exercise claim.
2. Whether parties claiming a "hybrid right" have a viable free exercise of religion claim if they fail to prove either prong necessary to establish such a "hybrid right."
3. Whether the circuit court of appeals, which considered the effect of ordinances and regulations as applied to the specific conduct of particular individuals, has only resolved the case on a "facial" basis.
4. Whether parties asserting a free exercise claim have established a constitutionally significant burden on free exercise rights when there is no religious belief which prevents compliance with any governmental requirement.

## PARTIES TO THE PROCEEDINGS

The County Respondents<sup>1/</sup> agree with the listing of parties by the Petitioners<sup>2/</sup> except as follows:

1. Three of the members of the Board of Supervisors originally sued in their official capacities by the Petitioners are no longer members of the Board of Supervisors. Those Board members are Audrey C. Moore, Martha V. Pennino and Lilla Richards. Pursuant to U.S. Supreme Court Rule 35.3, Robert B. Dix, Jr., Ernest J. Berger and Christine R. Trapnell are automatically substituted as parties.

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1/ This Brief in Opposition is submitted on behalf of the County Respondents, i.e., the Board of Supervisors of Fairfax County, Virginia, the individual members of the Board and the County Executive.

2/ References will also be made herein to the Thoburns and Drydens as "the Thoburns" and to the County Respondents as "the County." The Town Respondents will be referred to separately or as "the Town."

2. Petitioners list Christ College, Inc., as a party to these proceedings even though it was dismissed by the trial court based on a lack of standing. J.A. 24-53, 221-22, 1163-1217, 1275. The Fourth Circuit affirmed the ruling on standing as to Christ College, Inc. (Pet. App. 19a), and the Petitioners have not presented any question or made any argument before this Court regarding the ruling on the standing issue. As a result, it is obvious that Christ College, Inc., has no interest in the outcome of the Petition, and a notice to that effect should have been served by the Petitioners pursuant to U.S. Supreme Court Rule 12.4.<sup>3/</sup>

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3/ Citations to various documents shall be made as follows: the Joint Appendix presented to the Fourth Circuit: "J.A."; the Petition for Writ of Certiorari: "Pet.>"; the Appendix to the Petition: "Pet. App."; the Appendix to this Brief in Opposition: "App."; and the Thoburns' Brief in the Fourth Circuit: "Brief."

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CONSTITUTIONAL, STATUTORY AND REGULATORY  
PROVISIONS INVOLVED

The relevant excerpts from the following authorities, omitted by Petitioners, are set forth verbatim in the Appendix hereto:

Va. Code § 15.1-431 (Supp. 1991)

Va. Code § 15.1-446.1 (Supp. 1991)

Va. Code § 15.1-491 (1991)

Va. Code § 15.1-496 (1989)

Va. Code § 15.1-499 (1989)

Zoning Ordinance of Fairfax County, Virginia (Reprint 1988; Supp. Nos. 22, 26 and 27, 10/31/88, 12/11/89 & 3/26/90), Articles 2, 4, 5, 9 and 20 (excerpts)

STATEMENT OF THE CASE

On August 1, 1989, this suit was filed by the Petitioners, who claimed violations of their rights to the free exercise of religion, equal protection and due process, violations

of the Establishment Clause,<sup>4/</sup> and a conspiracy.<sup>5/</sup> The named defendants were the Board of Supervisors of Fairfax County, Virginia ("the Board"), the individual Board members, the County Executive, the Town of Vienna and the Vienna Board of Zoning Appeals ("Town BZA"). J.A. 21.

Trial commenced on May 7, 1990, and ended on May 9, 1990, when the court granted the County's and Town's motions for directed verdicts. J.A. 2067-72. The Thoburns' evidence revealed or, when specifically noted, failed to reveal, the following.

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<sup>4/</sup> The Petition does not challenge the dismissal of the equal protection and due process claims. In addition, the only question presented regarding the Establishment Clause relates to an action of the Vienna BZA and does not affect the County in any way. Pet. 29-30. Thus, the County Respondents need not and will not address such issues.

<sup>5/</sup> The dismissal of the conspiracy claim was not challenged in the Fourth Circuit and is not challenged in the Petition.

Robert Thoburn started Fairfax Christian School ("FCS") in 1961 in what was then the Town of Fairfax. J.A. 1518, 1589. FCS was located on commercial property and secured annual zoning permits. J.A. 1589-90. There was no evidence establishing that this property, or any other, had any religious significance for the Thoburns.

FCS moved to Fairfax County in 1964, after securing a special permit from the Fairfax County Board of Zoning Appeals ("County BZA") for property located on Popes Head Road ("Popes Head"). J.A. 1519-20, 3206-08. The Thoburns later secured additional special permits from the County BZA to expand the size of FCS. J.A. 1520, 1590, 3210-12, 3214, 3217, 3265-72.

FCS operated at Popes Head from 1964 to 1984, when its enrollment exceeded 500 students. J.A. 1522-23, 1758. FCS is and has been a for-profit business enterprise since its inception and is not tax-exempt. J.A.

1595-96, 1617, 3216. Robert Thoburn's wealth increased from less than \$1,000 in 1961 to over \$10 million in the 1980s. J.A. 1514, 1519.

FCS is one of dozens of Christian schools in the County. J.A. 1764. FCS is not affiliated with a church and does not teach the tenets of any religious denomination. J.A. 1742, 1932. The Drydens hold no religious belief that requires their children to be educated at FCS. J.A. 1823-24.

In 1984, the Thoburns sold the FCS campus at Popes Head for \$3 million without making the sale contingent upon approval of a new permanent home for FCS. J.A. 1523-24, 1591.

#### THE ZONING PROCESS

FCS is a private "school of general education" under the Fairfax County Zoning Ordinance. App. 44a. As such, FCS, like any other private school, must secure approval of a special exception ("SE") from the Board of Supervisors to operate with 100 or more

students on property zoned for residential uses. J.A. 1530-31; Pet. App. 47a, 49a, 53a-54a. One seeking an SE must file an application with supporting plans and information regarding the proposed use. J.A. 1531-32. A report is prepared by the County's planning staff, and the Planning Commission holds a public hearing after giving public notice and makes a recommendation to the Board of Supervisors. J.A. 1532-33. The Board also gives public notice and holds a public hearing on the SE application. J.A. 1534. There are secular standards specified in the Ordinance which the application must satisfy. App. 41a-44a; Pet. App. 56a, 58-59a.

The Fairfax County Zoning Ordinance permits private schools as a matter of right without an SE in all commercial zoning districts. J.A. 1628; App. 13a-23a. Private schools are also permitted uses in office or industrial parks in industrial districts. App. 24a-39a. Operation of FCS on commercial

property would not violate the Thoburns' religious beliefs, and they presented no evidence that operating on industrial property would offend their beliefs. J.A. 1589-90, 1667, 1823.<sup>6/</sup>

#### THE OAKTON PROPERTY

In February 1985, the Thoburns purchased approximately 59 acres of property in the Oakton area of Fairfax County ("the Oakton Property"). J.A. 3278-79. The Oakton Property is zoned R-1 (Residential, one dwelling per acre), a low density district,

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6/ The broad statement in the Petition that "most industrial and commercial land would not be suitable for a school" is misleading and unsupported by the evidence. Pet. 22 n.21. There was no evidence that any witness had examined any, much less most or all, non-residentially zoned land in the County to determine suitability for use as a school. The Thoburns' attempt to claim that the County itself could locate "only two such potential parcels" (Pet. 22-23 n.21) is also misleading because the Thoburns desired an existing building, not vacant land, which had to be at low cost in a limited area of the County. J.A. 1721-23.

and for many years had been planned for even lower density development with no intrusions allowed into the Environmental Quality Corridor ("EQC"). J.A. 1619, 3332, 3337-41; Pet. App. 47a-52a.<sup>7/</sup> The Thoburns purchased the Oakton Property without a contingency for SE approval and willingly took that risk. J.A. 1614-16; see also J.A. 3217.

The Thoburns submitted an SE application (SE 85-P-008) for FCS in 1985 for 576 students in a proposed 32,000-square-foot building on 37.51 acres of the 59-acre Oakton Property. J.A. 3281, 3285, 3289, 3293. There is no religious significance to the number of students at FCS. J.A. 1601-02. The Thoburns

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<sup>7/</sup> An EQC is an environmentally sensitive area consisting of floodplain and/or steep slopes. J.A. 1530, 1593, 1968, 3228-29, 3337-41. Va. Code § 15.1-490 (1989) requires the Board to give reasonable consideration to the "preservation of flood plains" in zoning matters. Pet. App. 33a. Va. Code § 15.1-446.1 (Supp. 1991) requires the adoption of a Comprehensive Plan by all counties. App. 4a-7a.

and Drydens have a total of 27 children, not all of whom attend FCS. J.A. 1601.

The County's planning staff and the Planning Commission recommended denial of SE 85-P-008 on numerous grounds: e.g., that the intensity of the FCS use would violate the Comprehensive Plan, which serves as the County's guide to future development; that the application did not satisfy all applicable zoning standards; and that it proposed a major disturbance of an established EQC. J.A. 1536-37, 1605, 2450, 3281-3322.

One concern was the Thoburns' plan to clear and grade large areas of the floodplain for the construction of ballfields, a consistent County concern. J.A. 1536-37, 1603-05, 1617, 2004, 3288. The Thoburns' own land use planner recommended that the ballfields be removed from the floodplain. J.A. 1606. However, the Thoburns did not remove the ballfields from the floodplain. The Thoburns offered to reduce the size of FCS

to 480 students. J.A. 1602-03, 1606, 2003-07, 3323. Thoburn did not present the Board with any land use or technical studies showing that his proposed intrusion into the EQC would not degrade the environment. J.A. 1605-06. The Board held a public hearing and did not approve the SE. J.A. 1534-35, 3323-27.

On February 3, 1987, Thoburn filed a second SE application (SE 87-P-006) for FCS for the Oakton Property (J.A. 1535-37), which was substantially similar to the original 1985 application in that it again proposed 576 students with ballfields in the EQC. J.A. 1602-05, 2003-07, 3332-37. The Comprehensive Plan had not changed as to the Oakton Property from 1985 to 1987. J.A. 1619-20. The planning staff and the Planning Commission recommended denial based on concerns similar to those expressed in 1985. J.A. 1536-37, 1605, 3281-89, 3334-47. On August 3, 1987, the Board of Supervisors denied SE 87-P-006 after holding a public hearing. J.A. 1537,

3377-3503. The Board's denial was based on secular reasons. J.A. 1537, 3491-98D.<sup>8/</sup>

INTERIM SITES

After the sale of Popes Head in 1984, FCS leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as interim sites. J.A. 1171, 1525-26, 3280. The leases for the sites were for terms of one year. J.A. 3375-76, 3507-08.

On March 4, 1988, the Fairfax County Office of Assessments sent a letter to Jerusalem Baptist inquiring into the substance of its lease with FCS.<sup>9/</sup> J.A. 3505. The

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<sup>8/</sup> The claim in the Petition that the Thoburns presented evidence "of county approval of school uses that created greater intensities of use, traffic and environmental effects" (Pet. 6) is misleading and inaccurate. None of the properties referred to by the Thoburns at the public hearing were ever shown to be similarly situated with the Oakton Property.

<sup>9/</sup> Tax-exempt property such as Jerusalem Baptist's cannot be leased for profit or otherwise generate revenue and retain full tax-exempt status. Va. Code § 58.1-3603 (1991). Pet. App. 44a-45a.

Thoburns offered to pay any taxes incurred as a result of the lease. J.A. 1595. Jerusalem Baptist did not renew the lease. J.A. 1547.

The property of the Jerusalem Baptist Church was zoned in the R-C District. J.A. 1540. A private school of general education was not allowed in the R-C District in 1984, either as a matter of right or with a special exception. J.A. 1540. County zoning enforcement officials knew that FCS was in violation of the Ordinance at the Jerusalem Baptist site and never took any legal action against the Thoburns or Jerusalem Baptist to abate the violation. J.A. 1539-41, 1597.

The Thoburns failed to present any evidence that FCS could not return to Temple Baptist Church in the Fall of 1988 or that the County had anything to do with their lease at that site. In fact, the Thoburns never provided any evidence to explain why FCS did not reopen at Temple Baptist Church.

HUNTER MILL

In February 1988, before the letter from the Office of Assessments to Jerusalem Baptist Church, the County, at the Thoburns' request, had performed a "team inspection" on two residential homes located on certain property owned by the Thoburns on Hunter Mill Road (hereinafter "Hunter Mill").<sup>10/</sup> J.A. 1548, 1550, 1608-09. The purpose of the team inspection was to determine what physical changes would be needed to convert the houses to meet building code requirements for a school. J.A. 1550, 1641-42, 1659-60, 1781, 1989-90. Robert Thoburn had known the purpose of team inspections since at least 1984, and he knew that such inspections do not involve zoning issues. J.A. 1597, 1626.

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10/ Hunter Mill is zoned R-E (Residential Estate), a low density area permitting one dwelling per two acres. J.A. 3566, 3589.

In May/June 1988, Robert Thoburn secured residential building permits from the County to renovate three houses at Hunter Mill. J.A. 1550, 1553, 3524, 3526. Thoburn's plans showed bedrooms, living rooms, etc., not classrooms. J.A. 1610-13. In submitting his permit applications, Thoburn certified: "the information is complete and correct, and that if a permit is issued the construction and/or use will conform to the building code, the zoning ordinance and other applicable laws and regulations . . ." J.A. 1631. Thoburn's building permits clearly indicated that he proposed only single-family residential uses in the three homes at Hunter Mill. J.A. 1915-18.

The Thoburns never intended to use Hunter Mill for residential purposes. J.A. 1613. Their plan was to renovate the houses under residential permits to meet code requirements for a school and then move FCS into the houses

before securing an SE. J.A. 1551-52, 1554.<sup>11/</sup> Thoburn's own fire and life safety expert testified that the County customarily relied upon all representations made in permit applications and that County procedures did not allow any non-residential occupancy under residential permits. J.A. 1914-18. The Thoburns were "well aware" of the SE requirement. J.A. 1864-65.

In late August 1988, the Thoburns told the Fairfax County Executive that they intended to open FCS without an SE. J.A. 1554-55. The Thoburns intended to open FCS at Hunter Mill on September 7, 1988, a date with no religious significance for the Thoburns. J.A. 1175, 1766-68, 1825-27, 2028-29, 3525.

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<sup>11/</sup> The building code requirements for schools are more demanding than those for residences. The code does not preclude a residence from exceeding residential requirements. Inspections under residential permits only evaluate compliance with residential requirements. J.A. 1915.

ISMAN

On September 1, 1988, the County Fire Marshal, Warren E. Isman, the Building Official and the Zoning Administrator filed suit in the Fairfax County Circuit Court to prevent the Thoburns from opening FCS at Hunter Mill without an SE and in violation of the building code.<sup>12/</sup> J.A. 1175, 1241, 1862-63.

The Thoburns' constitutional rights were raised at the September 13, 1989, trial of the Isman suit. J.A. 1632, 1866-68. The Thoburns claimed that the buildings were safe and that FCS was in an "emergency" situation. J.A. 1865, 1868. The state circuit court rejected all of the Thoburns' contentions and ruled for the County, finding that Hunter Mill was not safe for use as a school, and that the Thoburns were themselves responsible for

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12/ The County's suit was referred to at trial and shall be referred to herein as the "Isman" suit.

creating their own "emergency." J.A. 1867-68; see J.A. 2067-68, App. 45a-51a. The Thoburns appealed that decision to the Supreme Court of Virginia and lost. J.A. 1866. The Thoburns did not pursue the matter to this Court.

The Thoburns' own expert testified that, two days after the Circuit Court's Isman decision, numerous building code violations existed at Hunter Mill which "could be reasonably determined to be significant" fire and life safety issues. J.A. 1913-14.<sup>13/</sup>

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13/ The Thoburns' statement on page 11 of the Petition that "[t]he County Executive actually suggested that Fairfax Christian School be housed in a run-down, bullet-ridden vacant building in a crime- and drug-infested commercial area at Bailey's Crossroads" is particularly misleading and irrelevant. The County Executive had attempted to assist the Thoburns in finding a temporary home for FCS while they applied for a special exception. J.A. 1723. The Thoburns had told the County Executive that they did not want to spend "an awful lot of money in the interim time frame" and that "he needed to be centrally located if (footnote continued on next page)

VIENNA ASSEMBLY OF GOD CHURCH

After Isman, the Thoburns located their entire school (225 students, grades K-12) in Vienna at the Vienna Assembly of God Church ("VAGC"). J.A. 1560. The VAGC is located in a commercial area, and half of its property is zoned for commercial uses. J.A. 1560, 1667, 1848-50. Vienna is a town in Fairfax County,

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13/ (cont'd) possible." J.A. 1723. Based on staff research, a "couple of places" were identified: an existing warehouse which "could be converted easily to a school facility" and a former school in the Bailey's Crossroads area. J.A. 1722. There was no evidence at trial of any crime statistics in the Bailey's Crossroads area for 1988 or of any drug activity in the area of the former school in that time frame. Whereas the County Executive's voluntary attempt to assist the Thoburns was unsuccessful, there was no evidence that he had successfully assisted any other private school under similar circumstances. Furthermore, it must be recalled that it was the Thoburns who had placed themselves in a situation where they had no approved location for their school with the misguided notion that they were exempt from the County's zoning and building code regulations. Finally, the Thoburns fail to explain how the County Executive's attempt to assist them is relevant to the question of whether the County's Zoning Ordinance and Building Code regulations have been discriminatorily applied to them.

with a Town Council and a Town BZA. Vienna has had County officials provide building inspections pursuant to a long-standing agreement. J.A. 1799-1800, 2631-32. County officials made a team inspection of the VAGC for the Thoburns in May 1988 for 49 students. J.A. 1640-42, 1659-61, 2198-2202.

On July 20, 1988, the Town BZA approved FCS's application for a conditional use permit for 49 students, grades K-1, in the VAGC basement. J.A. 1662-63, 3809. On September 19, 1988, the Thoburns applied for a temporary use permit for 175 more students at the VAGC. J.A. 1673. The next day, with no approval of the request for 175 additional students and no occupancy approval for even 49 students, and without consulting the fire marshal, the Thoburns moved their entire school onto all floors of the VAGC. J.A. 1560, 1643-44, 1694, 1780, 1782-88. The Thoburns knew such action violated their conditional use permit. J.A. 1644, 1778-79.

On September 21, 1988, County fire officials inspected the VAGC at the Town's request. County fire technician Timothy Sparrow ordered FCS to evacuate the VAGC premises. J.A. 1677, 1793-95, 1801. The Thoburns refused to comply with the evacuation order and opened the school the next day. J.A. 1647-48, 1783, 1791. The Thoburns' own expert inspected the VAGC on September 22, 1988, and determined that numerous building code violations existed. J.A. 1897, 3794-3802. The expert testified at trial that significant and serious code violations impaired the fire and life safety of the occupants of the VAGC, and that "a reasonable inspector could note the accumulative [sic] code issues and looked [sic] to issue an evacuation order." J.A. 1919-21, 3794-3802. Vienna sought and was granted an injunction from the Fairfax County Circuit Court to preclude further FCS operations at the VAGC

without all necessary permits and approvals.

J.A. 1179-81. FCS continued to operate at the VAGC with over 200 students until the injunction ruling. J.A. 1649.

FCS was allowed to occupy the VAGC with 49 students on September 29, 1988, and with all students two weeks later once the Thoburns had substantially complied with all zoning and building code requirements. J.A. 1182, 1681, 1714, 1753.

#### THE HUNTER MILL SPECIAL EXCEPTION

On December 9, 1988, months after Isman, the Thoburns finally applied for an SE for FCS (310 students) in 14,915 square feet of building space on 29.15 acres at Hunter Mill. J.A. 1576, 3558-59, 3565. Hunter Mill is located near a major highway, the Dulles Toll Road, and existing office and industrial uses. J.A. 3566, 3578. The County planning staff recommended approval, with conditions. J.A. 1576, 3560-82. The Board of Supervisors approved the Hunter Mill SE on May 8, 1989,

subject to certain conditions related to the public health, safety and general welfare.

J.A. 2002-03, 2007-12, 3784-87.

THE THOBURNS' RELIGIOUS BELIEFS

The fact that the Thoburns have certain religious beliefs must be taken as true. However, in addition to the religious beliefs set forth in the Petition, the evidence at trial also established the following with respect to the Thoburns' beliefs.

The Thoburns have never asserted or established that their religious beliefs require that they operate FCS on any particular property or that they operate only on property zoned for residential uses. To the contrary, Robert Thoburn testified that the operation of FCS on property zoned for commercial uses did not violate his religious beliefs. J.A. 1589-90. The Thoburns have not asserted any religious belief forbidding them from operating FCS on property not zoned for residential uses. The Thoburns conceded

before the Fourth Circuit that "they do not have religious objections to all of the specific requirements of the zoning and building regulations at issue in this case." Pet. 21 n.18. The record is devoid of any evidence that the Thoburns have any religious objection to any specific requirement of the County's zoning and building regulations.

Robert Thoburn, the owner of FCS, testified that he could not think of any situation with regard to Fairfax County or any Fairfax County officials in which he violated his religious beliefs. J.A. 1588. He testified that going through the County zoning process to secure special permits to operate FCS in the 1960s did not violate his religious beliefs. J.A. 1588. He further indicated that the submission of site plans for the development of FCS at Popes Head did not violate his religious beliefs. J.A. 1588. In light of such testimony, it must be concluded that the Thoburns' submission of applications

for special exceptions to operate FCS at the Oakton Property and at Hunter Mill did not violate his religious beliefs. Also, the Thoburns have not asserted any religious belief which would preclude them from complying with any and all of the conditions connected with the approval of their special exception to operate FCS at Hunter Mill.

Regarding the Oakton applications, Robert Thoburn testified that there was no religious significance to having ballfields in the floodplain at that site, no religious mandate requiring the clearing of hundreds of trees to locate such ballfields, and no religious significance to any particular number of ballfields. J.A. 1616.

Concerning FCS operations generally, Robert Thoburn's testimony at trial established that there is no religious significance to any particular number of students at FCS. J.A. 1601-02. There is no

religious significance to opening FCS on September 7 or any other date. J.A. 1768-69.

Finally, Glenn Dryden has neither any religious belief requiring the education of his children on any particular piece of property nor any belief requiring their education only at FCS. J.A. 1823-24.

THE THOBURNS' APPEAL TO THE FOURTH CIRCUIT

The Thoburns appealed the directed verdict decision of the district court to the Fourth Circuit on its free exercise, equal protection, due process and Establishment Clause claims. The Thoburns' appeal to the Fourth Circuit also challenged the district court's decision to exclude certain evidence at trial as well as numerous other pre-trial procedural rulings. The Fourth Circuit affirmed all of the substantive and procedural rulings of the district court. Pet. App. 1a-23a. The Fourth Circuit reviewed the voluminous record and concluded that the Thoburns had "failed to establish the first

element in any free exercise claim: they have not proved that the zoning laws or fire codes burden their exercise of religion." Pet. App. 8a. It also concluded that the Thoburns failed to establish either that they were "subjected to discriminatory treatment vis-a-vis another similarly situated party" or that there was any "discriminatory animus" on the part of the County. Pet. App. 10a-11a.

SUMMARY OF REASONS FOR DENYING THE PETITION

The Fourth Circuit fully and fairly reviewed the record and properly decided that the County's application of zoning and building ordinances and regulations to the Thoburns did not impose any constitutionally significant burden on their free exercise of religion. The Fourth Circuit's decision is consistent with this Court's precedents, and the Thoburns have failed to identify any aspect of the decision which is in direct conflict with decisions of other courts. The Thoburns' Petition, to a great extent, is

based on improper characterizations and unfounded assumptions relative to the decision of the Fourth Circuit. In addition, the Thoburns fail to challenge the exclusion of evidence and yet attempt to rely on that same evidence in this Court.

Based on the Thoburns' own evidence, it is clear that they could have, without any offense to their religious beliefs, complied with all of the County's ordinances and regulations. Their own proof demonstrated that when the Thoburns have complied with the County's reasonable and valid zoning and building regulations, FCS has flourished. In the absence of any constitutionally significant burden, (Question Presented # 3), this case does not involve a viable free exercise of religion claim, and there can be no "hybrid right." As a result, this case is simply a garden variety zoning case which does not raise any important constitutional issues for this Court.

I. PARTIES WHO CONCEDE THE CONSTITUTIONALITY OF GOVERNMENT ZONING AND BUILDING CODE REGULATIONS AND FAIL TO PROVE ANY RELIGIOUS ANIMUS OR DISCRIMINATORY TREATMENT BASED ON RELIGIOUS BELIEFS DO NOT HAVE A VIABLE FREE EXERCISE CLAIM.

The Thoburns concede that the County's laws and regulations are constitutional. Pet. 20. It is clear that the Thoburns have decided to allow their free exercise claim to rest solely on their argument that the County and Vienna discriminatorily applied and enforced the applicable ordinances and regulations. Pet. 15 n.11, 20-21, 22 n.20, 23.

The Thoburns' argument that the County's ordinances and regulations were applied to them in a discriminatory manner is unsupported by any substantial evidence in the record. In essence, the Thoburns are asking this Court to grant them a writ of certiorari based on a record which they never established at trial. A review of certain aspects of particular claims of discrimination is enlightening.

The Thoburns argue that the denials of their special exception applications for the

Oakton Property were "pretextual." Pet. 25. Their evidence showed, however, that there were legitimate secular reasons (e.g., significant intrusions into an established EQC and intensity of the proposed use) supporting the denials of those applications in a low-density residential area and that both the County professional planning staff and the Planning Commission had recommended denial of those applications. The record is devoid of any evidence showing that such environmental and land use issues were not of any concern to the Board in the review of a special exception application for any other private school on any similarly situated property. The record is devoid of any evidence which showed that any other private school was approved in the vicinity of the Oakton Property with the same environmental and intensity problems. In fact, the record revealed that the application for FCS was approved when the Thoburns sought a special exception for a less intense use at

Hunter Mill with no encroachment in an EQC. J.A. 3566-3571, Pet. App. 60a-65a. Finally, the Thoburns admit that their claim of a "pretext" is based on evidence which was excluded at trial. Pet. 25 n.25. The Fourth Circuit affirmed the trial court's evidentiary ruling (Pet. App. 17a), and the Thoburns do not challenge that ruling in this Court. Accordingly, the Thoburns' argument is improperly based on excluded evidence.

The Thoburns attempted to show at trial that their applications for the Oakton Property were treated unfairly when compared to other land use requests. The trial court excluded the evidence the Thoburns sought to present, primarily because of the Thoburns' failure to establish that these other properties were "similarly situated." J.A. 1946-1983. The Fourth Circuit affirmed these evidentiary rulings in all respects. Pet. App. 14a-16a. The Thoburns cannot rely on evidence which was excluded at trial when the

exclusion was upheld on appeal and they make no attempt to challenge any evidentiary rulings in this Court.

The Thoburns also claim "harassment" based on an inquiry sent to Jerusalem Baptist Church by the County's real estate assessment office. Pet. 25. The letter in question simply requested information from the Church because FCS, which was not a tax-exempt entity, was leasing or using tax-exempt property to conduct its private school. J.A. 1595, 3505. The Fourth Circuit recognized that the letter was proper under Virginia law. Pet. App. 4 n.1. The Thoburns never called as a witness the author of the letter, any other official from the assessor's office or anyone from Jerusalem Baptist Church. Furthermore, the Thoburns did not present any evidence showing more favorable treatment for any similarly situated property. The Thoburns misrepresent the facts when they assert that

the inquiry from the assessment office constituted "harassment."

The Thoburns also claim that the Isman suit was "unprecedented" and "unwarranted." Pet. 8, 25. The Thoburns' own evidence revealed that they had secured residential building permits for their renovations which showed bedrooms, living rooms, etc., not classrooms, and that they never intended to use the buildings for residential purposes. J.A. 1550-54, 1610-13, 3524, 3526. Further, they intended to open FCS without a special exception on September 7, 1988, a date with no religious significance for the Thoburns. J.A. 1175, 1554-55, 1766-68, 1825-27, 2028-29, 3525. The Isman suit was filed on September 1, 1988, and the Thoburns' own fire and life safety expert at trial in the case at bar testified that, as late as September 15, 1988, numerous building code violations existed at Hunter Mill which "could be reasonably determined to be significant" fire and

life safety issues. J.A. 1175, 1241, 1862-63, 1913-14. Instead of being "unwarranted," the record clearly reveals that the filing of the suit in Isman was totally justified.

The Thoburns failed to present any evidence at trial to show that any other private school had secured residential building permits under false pretenses and either had intended to open or did open such a school without first securing approval of a special exception and complying with the building code. The Thoburns' claim that the filing of the Isman suit was "unprecedented" is a claim without any substance because, as the Fourth Circuit found, they failed to present any evidence of disparate treatment or religious animus on the part of the County. Pet. App. 11a. If anything, there was disparate treatment in favor of the Thoburns at Jerusalem Baptist Church, where they operated FCS illegally and the County took no legal action. J.A. 1539-41, 1552, 1597.

The Thoburns' pleadings asserted that the actions relating to the VAGC were "arbitrary and unreasonable" and were taken "without consideration of the religious interests at stake . . ." J.A. 1199. The first part of this claim was affirmatively disproven by their own expert witness, and the second part is diametrically opposed to the Thoburns' argument in this Court that Isman was filed because of their religious beliefs.

Finally, the Thoburns claim that they were harmed by the County, even when the Board approved their special exception application for 310 students at Hunter Mill in May 1988, due to the imposition of "expensive and unwarranted" conditions. Pet. 26. A review of the conditions imposed by the Board reveals no religious animus, only secular concerns. Pet. App. 60a-65a. The record is devoid of

any evidence detailing the Thoburns' monetary cost in satisfying any particular condition<sup>14/</sup> or of any evidence that any particular condition was "unwarranted." Instead of SE conditions being unusual, the imposition of standard conditions and others which are uniquely tailored to the site is a common practice in the County. J.A. 2011.

The Thoburns never explain to this Court where the record supports their assertion that the Board's conditions were improper. To the contrary, the record reveals that: 1) the Thoburns agreed to construct the left turn lane; 2) the condition requiring consolidation of entrances is "very common" and is for "safety purposes"; 3) the condition requiring site plan approval (Condition #3) is "standard"; and 4) the condition limiting the

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<sup>14/</sup> In any event, the monetary cost of satisfying a governmental requirement does not impose a constitutionally significant burden. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

hours of operation is "very common." J.A. 1634, 2008, 2011, 2012.

Having conceded that the County's ordinances are constitutional as drafted, the Thoburns are, in essence, asking this Court to grant a writ of certiorari for a case of "religious discrimination" which does not exist. The record does not support the Thoburns' claim that they have been singled out for disparate treatment or religious animosity relative to the County's admittedly constitutional ordinances. The Fourth Circuit correctly concluded that the Thoburns failed to prove that they had been "subjected to discriminatory treatment vis-a-vis another similarly situated party," that there was "any religious animus on the part of the town or the county," or that there was "any evidence at all of legislative animus toward religion or any religious group." Pet. App. 10a-11a. Significantly, none of the questions presented

by the Thoburns in their Petition seek to challenge these particular conclusions by the Fourth Circuit. Based on this fact alone, this Court should deny the Thoburns' Petition.

Even if this Court were inclined to grant the Petition, it is clear from this record that the Court would be unlikely to reach the free exercise issues asserted by the Thoburns because the very underpinning of those legal arguments (that they have proven a case of religious discrimination) is not supported by the evidence admitted at trial. In fact, the Thoburns' own evidence affirmatively revealed fair treatment by the County within the bounds of admittedly constitutional ordinances.

**II. PARTIES CLAIMING A "HYBRID RIGHT" HAVE NO VIABLE FREE EXERCISE OF RELIGION CLAIM IF THEY FAIL TO PROVE EITHER PRONG NECESSARY TO ESTABLISH SUCH A HYBRID.**

The first reason argued by the Thoburns for granting the Petition in the case at bar is based upon their contention that this is a

"hybrid rights" case. Pet. 15. This contention has no merit.

In addition, the Thoburns' contention that the Fourth Circuit's decision is in conflict with those of other courts on the "hybrid rights" issue is also unfounded because: 1) the Fourth Circuit determined that it did not need to decide the "hybrid rights" issue because it concluded that the Thoburns failed to prove any burden on their free exercise of religion; 2) the cited cases are distinguishable on their facts; 3) none of the cited cases substantively conclude that under their facts any such "hybrid rights" exist and that strict scrutiny was required; and/or 4) references to "hybrid rights" in many of the cited cases are dicta.

This Court has ruled that a religion-neutral, generally applicable law does not implicate any free exercise rights.

Employment Division, Dep't of Human Res. v. Smith, 494 U.S. \_\_\_, 110 S. Ct. 1595 (1990).

Smith recognized that the only decisions in which this Court has held that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." 110 S. Ct. at 1601. This Court referred in Smith to a "hybrid situation." 110 S. Ct. at 1602. The Thoburns refer to "hybrid rights," and implicitly maintain that Smith created a new constitutional right. Pet. 14-19.

The Thoburns now claim that the case at bar involves two types of "hybrid rights," one rising out of the "free speech" line of cases and the other rising out of the "parental rights" line of cases. Pet. 17. As to the "free exercise/free speech" hybrid now asserted by the Thoburns, it must be noted that their suit never included any free speech

claim. J.A. 24-53.<sup>15/</sup> With regard to their claim of a "free exercise/parental rights" hybrid, the Thoburns never pled any such separate and distinct count for such a claim in the trial court. J.A. 24-53. Even if the Thoburns had pled more than a straight free exercise claim, it is clear that they have a fundamental misunderstanding of the fact that a "hybrid right" necessarily requires a proper foundation of both prongs of such a hybrid. Having failed to show any constitutionally significant burden on their free exercise rights and any violation of parental rights, the Thoburns did not even come close to satisfying either prong of any "hybrid right."

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15/ The County Respondents will not respond to Thoburns' brief reference to a "free exercise/free speech" hybrid because of their failure to fully assert such a claim either in the trial court or at the Fourth Circuit.

The Thoburns argue that their "free exercise/parental rights" hybrid is supported by Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Wisconsin v. Yoder, 406 U.S. 205 (1972). Pet. at 16-17. However, neither Pierce nor Yoder offer any such support.

Yoder involved a compulsory school attendance law which required children to attend school until reaching age 16. Yoder genuinely believed that his children's attendance at any high school, public or private, was contrary to the fundamental tenets of the Amish faith. 406 U.S. at 210, 217. This Court noted the effect of the attendance law in Yoder by stating that:

[t]he impact of the . . . law on [Yoder's] practice of the Amish religion is not only severe, but inescapable, for the . . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.

Id. at 218. (Emphasis added).

Further, the decision in Smith recognized the following language in Yoder:

when the interests of parenthood are combined with a free exercise claim of the nature . revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.

110 S. Ct. at 1601 n.1 (citing Yoder) (emphasis added). The Thoburns' free exercise claim does not even come close to the nature of the Amish claim in Yoder. The Thoburns could have complied with all of the County's regulations without offending any of their religious beliefs. The Amish litigants in Yoder, unlike the Thoburns, were placed on the horns of a dilemma: they could not comply with the attendance law without violating their religious beliefs. Finally, Yoder emphasized that the "convincing showing" of the Amish was "one that probably few other religious groups or sects could make." 406

U.S. at 235-36. No such convincing showing was ever made by the Thoburns.

Similarly, the Thoburns' case fails to establish any violation of "parental rights" as was involved in Pierce. The issue in Pierce was whether Oregon had the power to mandate public school education and require the "destruction of appellees' primary schools . . ." 268 U.S. at 534. Pierce held that the Oregon law unreasonably interfered with the liberty of parents to direct the education of their children and stated that constitutional rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S. at 535. This Court overturned the Oregon law on due process grounds because application of the law mandated education at public schools and prohibited parents from having their children attend any private school.

The case at bar does not involve the type of drastic regulation ruled invalid in Pierce. The Thoburns' evidence did not show that FCS was regulated out of existence or that any religious beliefs would be offended by their compliance with the law. Instead, the Thoburns proved that FCS is permitted, as a matter of right, in numerous non-residential districts, and that they have obtained zoning approvals on a number of occasions. However, on other occasions the Thoburns chose, after voluntarily selling their existing school for \$3 million without a ready replacement, to ignore reasonable and valid zoning and building regulations.

The Thoburns' arguments before this Court also defy logic as they attempt to conclude that any religious use which involves a parent's right to raise children, automatically qualifies for strict scrutiny analysis. It matters not to the Thoburns that they can comply with the County's laws and

regulations without violating their religious beliefs. Smith recognized that because we value a wide diversity of religious preferences, "we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." 110 S. Ct. at 1605. (emphasis in original).

The weakness of the Thoburns' argument is abundantly clear when their facts are contrasted with those in Smith. In Smith the state of Oregon criminalized the ingestion of peyote, a sacramental rite in the Native American Church. This Court concluded that this sacramental rite could be prohibited, without offending free exercise rights, because the criminal statute was a neutral, generally applicable law.

Like the criminal statute in Smith, the County's zoning and building code regulations are neutral and generally applicable to all

persons, regardless of religion. The Thoburns failed to establish any religious animus or disparate treatment regarding how those laws were applied to them. Pet. App. 10a-11a. The Thoburns have not asserted any religious belief which either compels them to violate the County's laws or which restrains compliance on their part. This Court noted in Smith that its decisions have

consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'

110 S. Ct. at 1600. This Court also stated that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Id.

The Thoburns fail to explain why the state of Oregon can absolutely prohibit a

sacramental rite of one religion, while at the same time the County cannot require FCS to satisfy basic zoning, building, fire and safety codes which do not offend anyone's religious beliefs. The Thoburns ask this Court to declare FCS a law unto itself, such that they can pick and choose among the County's laws to determine the ones with which they wish to comply and those they wish to violate. Such a conclusion would result in the same "constitutional anomaly" that this Court disavowed in Smith. 110 S. Ct. at 1604.

The Thoburns' attempt to claim that the decision of the Fourth Circuit is in conflict with the decisions of other courts is equally unpersuasive. There is no conflict because the Fourth Circuit concluded that it did not need to decide any issue of "hybrid rights" because the Thoburns' evidence failed to show that there was any constitutionally significant "burden" upon their exercise of religion. Pet. App. 8a. The Thoburns' claim

of a conflict among the circuits regarding the recognition of "hybrid rights" (Pet. 15, 19) is also misleading because their own question presented relies not only on the "recognition of hybrid rights," but also its claim that strict scrutiny automatically applies. Pet. i. Even if the Fourth Circuit had concluded that no "hybrid right" exists in the present case, the Thoburns fail to cite any case from any other lower court which finds, under similar circumstances, the existence of such a "hybrid right" and that strict scrutiny automatically applies.

One of the very cases cited by the Thoburns as being in "conflict" with the Fourth Circuit's decision is, if anything, totally consistent. In Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183 (3d Cir. 1990), the Third Circuit rejected the free exercise/freedom of association "hybrid rights" asserted by the religious objector based on the fact that "the present

controversy does not concern any state action directly addressed to religion . . . ." 919 F.2d at 200. For all intents and purposes, this is the same rationale used by the Fourth Circuit in rejecting the Thoburns' free exercise claim. Pet. App. 8a-9a.

The only zoning case cited by the Thoburns is Cornerstone Bible Church v. City of Hastings, U. S. App. LEXIS 26060 (8th Cir. 1991), where the court dealt with an ordinance which excluded churches from a central business district, even though similar non-commercial uses were permitted in the same area. Id. at \*6 n.3. In the case at bar all private schools are permitted either as a matter of right or by special exception in virtually all of the County's zoning districts. Pet. App. 49a, 53a-55a; App. 12a-42a. A separate free speech claim, in addition to the free exercise claim, was asserted by the church in Cornerstone. Id. at \*5-\*13. No such separate claim has been

asserted by the Thoburns. J.A. 1163-1217. The Eighth Circuit did not substantively analyze the "hybrid rights" claim asserted by the church but merely remanded the matter to the district court. Id. at \*24. There was no need for the Fourth Circuit to analyze the Thoburns' "hybrid rights" argument either, as it concluded the Thoburns had failed to prove any constitutionally significant burden on the free exercise of religion. Pet. App. 8a.

The Thoburns cite State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254 (1990), in support of its conflict argument. Pet. 19. DeLaBruere is distinguishable on its facts. In any event, DeLaBruere contradicts the Thoburns' own question presented that strict scrutiny must apply in a "hybrid rights" case. Id. at 263 n.10.

III. THE FOURTH CIRCUIT, WHICH CONSIDERED THE EFFECT OF ORDINANCES AND REGULATIONS AS APPLIED TO THE SPECIFIC CONDUCT OF PARTICULAR INDIVIDUALS, DID NOT RESOLVE THE CASE ON ONLY A "FACIAL" BASIS.

The Thoburns' second reason for granting certiorari is based on the fallacy that the Fourth Circuit only viewed their case as a facial challenge. Pet. 20. Contrary to the Thoburns' assertions, the Fourth Circuit never stated that the instant suit was limited to a facial challenge or that it was not deciding an "as applied" case. Pet. App. 1a-23a. Since the Thoburns' argument is based on a faulty interpretation of the Fourth Circuit's decision, their contention that there is a conflict among the circuits is baseless.

The Thoburns disregard the fact that the Fourth Circuit clearly understood that they were arguing that "the zoning and fire safety policies of the county and the town impinged on their first amendment rights to the free exercise of religion." Pet. App. 7a. In

determining that the Thoburns had failed to prove the existence of a constitutionally significant burden, the Fourth Circuit was deciding whether the Thoburns proved any such burden existed in the context of their religious beliefs.

The Thoburns now hinge their entire argument on their assertion that they have been discriminated against because of their religious beliefs. Pet. 22 n.20. In essence, the Thoburns' claim of "discrimination" is more an equal protection challenge than a free exercise challenge. The Thoburns argued to the Fourth Circuit that "where a statute is neutral on its face, an equal protection violation may be shown if there is evidence that the official action was motivated, in whole or in part, by a discriminatory purpose or intent." Brief 32. The Fourth Circuit clearly found that the Thoburns failed to establish any religious animus or adverse disparate treatment by the County.

Pet. App. 8a-11a. Simply stated, the Fourth Circuit, without limiting itself to the facial validity of the County's ordinances and regulations, concluded that there was no proof of discriminatory treatment of the Thoburns.

In response to an offer of proof at trial, the County stipulated that the Board did not take religion into account in denying the Thoburns' SE applications for the Oakton Property. J.A. 1427. The Fourth Circuit noted a "bald reversal of strategy" on the part of the Thoburns when they attempted to argue that the trial court erred in excluding the testimony of county policymakers for the purpose of determining their state of mind when they voted to deny FCS's special exception applications. Pet. App. 16a. The Fourth Circuit noted that at trial the Thoburns contended such evidence was necessary to show that the legislators failed to take religion into account when they voted to deny the special exceptions. Pet. App. 16a.

However, on appeal the Thoburns argued that this exclusion of evidence was improper because the evidence would have shown that the legislators did, in fact, take religion into account. Pet. App. 16a-17a. The Fourth Circuit ruled that the Thoburns cannot be allowed to challenge the trial court's ruling on appeal "on a diametrically opposed position to the only one taken in the district court." Pet. App. 17a. Even though the Thoburns do not challenge this ruling before this Court, their characterizations regarding "harassment" and "discrimination" contain the implicit notion that they continue to assert their "diametrically opposed position" before this Court. It is respectfully submitted that this Court should not give credence to such a reversal in positions by the Thoburns.

IV. PARTIES ASSERTING A FREE EXERCISE OF RELIGION CLAIM HAVE NOT ESTABLISHED A CONSTITUTIONALLY SIGNIFICANT BURDEN ON FREE EXERCISE RIGHTS WHEN THERE IS NO RELIGIOUS BELIEF WHICH PREVENTS COMPLIANCE WITH AN ORDINANCE OR REGULATION.

It is the Thoburns' position that any law, ordinance or regulation which, by its application, poses any obstacle to the opening of a religious school, regardless of religious beliefs, necessarily "burdens" the free exercise of the operator's and students' religious beliefs in a constitutionally significant way. The Thoburns attempt to cloak their failure and/or refusal to comply with reasonable zoning and building regulations under the guise of free exercise of religion. At the same time, they ignore the fact that the problems they had in reestablishing their school, after voluntarily selling their original campus without having a ready replacement, were self-inflicted and unrelated to religion.

Instead of claiming a conflict among the circuits regarding the burden issue, the Thoburns simply assert that "confusion" exists. Pet. 22. The Thoburns' reliance on post-Smith "burden" cases for its assertion of "confusion" is implicitly based on the fallacy that Smith itself broke new ground on the issue of what constitutes a constitutionally significant burden. There is no confusion because the cases cited by the Thoburns for their "confusion" theory: 1) involve governmental requirements which could not be satisfied without prohibiting the exercise of a sincerely held religious belief, and/or 2) do not analyze whether a constitutionally significant burden exists under their facts. Assuming, arquendo, there is any such "confusion," the federal circuits should be allowed time to sort out the issue until, in fact, an intelligible conflict emerges. Thus, it would be premature to grant certiorari in the instant case.

The very cases cited by the Thoburns in support of their Petition are, for all relevant purposes, totally consistent with the decision of the Fourth Circuit. In Thomas v. Review Board, 450 U.S. 707 (1981), this Court stated that when the government

[c]onditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

450 U.S. at 717-18.

The evidence in the case at bar does not reveal any religious belief which required the Thoburns to take any action which was inconsistent with any of the zoning or building regulations applied by County officials to FCS. In addition, there is no evidence of any religious belief which prevented the Thoburns from complying with any zoning or building regulation applied by

County officials to FCS. As set forth above, there is also no evidence of any religious animus or disparate treatment as to the Thoburns. Moreover, the only laws which were ever applied to the Thoburns by the County were zoning and building regulations which are neutral and generally applicable.<sup>16/</sup>

Just three months before deciding Smith, this Court unanimously upheld a neutral, generally applicable sales tax on the distribution of religious materials, finding that Jimmy Swaggart Ministries had neither alleged nor proven that the mere payment of the tax violated any sincere religious

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16/ When the Thoburns state on page 24 of their Petition that they "were required by law to send their children to school," they imply that part of their "burden" was supplied by the Virginia compulsory school attendance law. See Va. Code §§ 22.1-254 through -266 (1985 and Supp. 1991). Pet. 24. However, there is no evidence that the Thoburns were threatened with any enforcement of that law. Furthermore, there was no evidence that any of the County's actions were motivated by a desire to compel the Thoburns' children (footnote continued on next page)

beliefs. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391, 392 (1990). This Court reiterated that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." 493 U.S. at 384-385, citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

The Thoburns have admitted that they have no religious objection to all of the specific zoning and building regulations. Pet. 21 n.18. Indeed, there is no evidence

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16/ (cont'd) to attend a public school. Even if state officials had sought to enforce the school attendance law against the Thoburns, Virginia's statute provides a clear exemption, not found in Yoder, for "bona fide religious training or beliefs." Va. Code § 22.1-257(2) (Supp. 1991); see Va. Code § 22.1-256(4) (1985), Pet. App. 37a-38a. In any event, neither the Petition nor the record indicate as to any Virginia statute that the Thoburns have served the Attorney General of Virginia with the notification required by Rule 29.4.

that they have any religious objection to any such regulation. The Thoburns' repeated references in their Petition to the "burden" on their religious beliefs regarding the temporary closure of their school until the building regulations were satisfied are particularly misleading as to the basic building, fire and safety regulations applied to FCS. Pet. 23-25. The reason is that the Thoburns' own evidence clearly established that they agreed to satisfy all such requirements and agreed that they would not open their school until doing so. J.A. 1554, 1556, 1717. The Thoburns have failed to establish how their religious beliefs were "burdened" in any significant way by such regulations because: 1) they admit that they have no religious objections to such regulations; 2) they agreed to comply with those regulations "as applied" to them; and 3) they agreed that they would not open their school (at Hunter Mill) and would voluntarily

suspend classes (in Vienna) in order to satisfy those same regulations.

The Thoburns' final argument regarding the burden issue amounts to an attempt to obfuscate the lack of any nexus between the Fairfax County regulations at issue and their religious beliefs. The Thoburns invite attention to a variety of post-Smith cases which are asserted to reveal "confusion" on the "burden" issue. Pet. 27-29. Contrary to the Thoburns' assertions regarding post-Smith "burden" cases, the cited cases either focus upon a governmental regulation which prevents the exercise of sincerely held religious beliefs or they do not even analyze whether or not a constitutionally significant burden exists in the first place.

The first case cited by the Thoburns on this issue is United States v. Board of Education of Philadelphia, 911 F.2d 882 (3d Cir. 1990), wherein the existence of a burden on the free exercise of religious beliefs was

never a matter of contention. Id. at 889. In Philadelphia a devout Muslim teacher dressed in a manner mandated by her religious beliefs, and the Pennsylvania Garb Statute expressly prohibited such attire. Id. at 884-85. Obviously, the teacher in Philadelphia could not comply with the Garb statute without violating her religious beliefs. Equally obvious is the fact that no such relationship of religious mandate and legal prohibition exists between the Thoburns' asserted beliefs and the County's ordinances and regulations.

The Thoburns next cite Cornerstone Bible Church v. City of Hastings, U.S. App. LEXIS 26060 (8th Cir. 1991). In Cornerstone, the Eighth Circuit ruled that the zoning ordinance at issue had "no impact on religious belief and should not be construed as directly regulating religious-based conduct" and, thereupon, upheld the district court's grant of summary judgment in favor of the city on the free exercise issue. Id. at \*21. This

portion of the Cornerstone decision is totally consistent with the ruling of the Fourth Circuit in the case at bar. Later in Cornerstone the Eighth Circuit simply directed the district court to "consider" the Church's "hybrid rights" claim on remand. Id. at \*24. Significantly, the Eighth Circuit never found any "burden" and did not decide any "hybrid rights" claim on the merits. The Thoburns' reliance on Cornerstone is clearly misplaced.

The Thoburns next cite State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254 (1990), a Vermont case which is also factually distinguishable from the instant suit. DeLaBruere involved a situation in which a student's parents, members of the Church of Island Pond, were charged with violating Vermont's compulsory education law, which requires private schools to file a certain report with the state. 577 A.2d at 257-58. The parents objected to the reporting requirement on religious grounds, and the

state conceded that "the Church's failure to report to the state [was] motivated by a sincerely held religious belief." 577 A.2d at 261. Unlike DeLaBruere, the Thoburns' evidence affirmatively established that they have no religious belief which prevented them from securing the approval of a special exception or any other zoning, building or occupancy permit.

The Thoburns' reliance upon prisoners' rights cases is similarly misplaced. In Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990), the prison policy was in direct conflict with a Muslim's religious belief which prohibited the consumption of pork. In Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990), the existence of a constitutionally significant burden was not at issue because the prison officials did not contest that their policy infringed on the prisoner's free exercise rights. Id. at 1170. In Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990), cert. denied sub

nom. Naftel v. Arizona, 111 S. Ct. 996 (1991), the Ninth Circuit did not consider the impact of Smith. Id. at 331 n.1. In any event, unlike the County's zoning and building regulations in the case at bar, the prison grooming policy was in direct conflict with the beliefs of Orthodox Jews, who "could not shave their beards without transgressing their religious beliefs." Id. at 329.

Taken together, all of the pertinent authorities accord with the proposition that, to demonstrate a constitutionally significant burden on the free exercise of religious beliefs, a plaintiff must demonstrate a nexus between a governmental regulation which requires/proscribes conduct which is proscribed/required by the plaintiff's religious beliefs. The Fourth Circuit's conclusion that the regulations at issue in this case did not burden the Thoburns' religious beliefs is entirely consistent with these authorities. Pet. App. 8a-9a. There is

no conflict among the cited cases about the nature of a constitutionally significant burden on the free exercise of religious beliefs, and there is, therefore, no reason for this Court to grant the Thoburns' Petition to consider the burden issue.

CONCLUSION

The County Respondents pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Robert Lyndon Howell  
Acting County Attorney

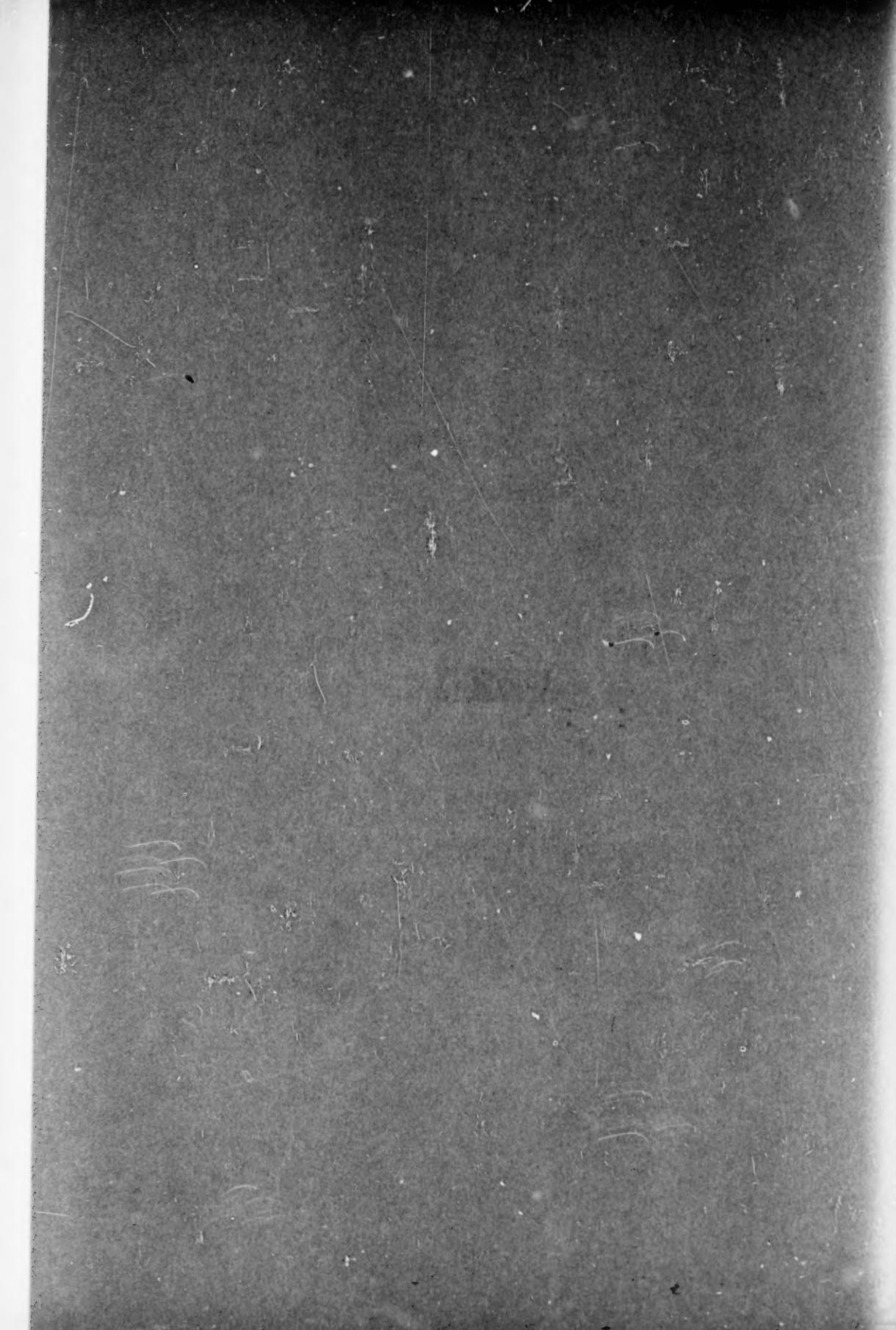
J. Patrick Taves  
Senior Assistant County Attorney  
Counsel of Record for County  
Respondents

Mark B. Taylor  
Assistant County Attorney  
4100 Chain Bridge Road  
Fairfax, Virginia 22030  
(703) 246-2421

January 14, 1992



## APPENDIX



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APPENDIX

Va. Code § 15.1-431 (Supp. 1991)

Advertisement of plans, ordinances, etc; joint public hearings; written notice of certain amendments. - Plans or ordinances or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a reference to the place or places within the county or municipality where copies of the proposed plans, ordinances or amendments may be examined.

The local commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in such county

or municipality; provided, that such notice for both the local commission and the governing body may be published concurrently. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement shall appear in such newspaper. The local commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If such joint public hearing is held, then public notice as set forth above need be given only by the governing body. The term two successive weeks as used in this paragraph shall mean that such notice shall be published at least twice in such newspaper with not less than six days elapsing between the first and second publication.

When a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels

of land, then, in addition to the advertising as above required, written notice shall be given by the local commission at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. In any county or municipality where notice is required under the provisions of this section, notice shall also be given to the owner, their agent or the occupant, of all abutting property and property immediately across the street from the property affected which lies in an adjoining county or municipality of the Commonwealth. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement. If

the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.

\* \* \*

Va. Code § 15.1-446.1 (Supp. 1991)

Comprehensive plan to be prepared and adopted; scope and purpose. - The local commission shall prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction.

Every governing body in this Commonwealth shall adopt a comprehensive plan for the territory under its jurisdiction by July 1, 1980.

In the preparation of a comprehensive plan the commission shall make careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of its territory and inhabitants. The comprehensive plan shall be made with the purpose of guiding

and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants.

The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of each feature shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.

Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission's long-range recommendations for the general development of the territory covered by the plan, including the location of existing or proposed recycling

centers. It may include, but need not be limited to:

1. The designation of areas for various types of public and private development and use, such as different kinds of residential, business, industrial, agricultural, conservation, recreation, public service, flood plain and drainage, and other areas;
2. The designation of a system of transportation facilities such as streets, roads, highways, parkways, railways, bridges, viaducts, waterways, airports, ports, terminals, and other like facilities;
3. The designation of a system of community service facilities such as parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, sewage disposal or waste disposal areas, and the like;
4. The designation of historical areas and areas for urban renewal or other treatment;

5. The designation of areas for the implementation of reasonable groundwater protection measures;

6. An official map, a capital improvements program, a subdivision ordinance, and a zoning ordinance and zoning district maps; and

7. The designation of areas for the implementation of measures to promote construction of and maintenance of affordable housing.

Va. Code § 15.1-491 (Supp. 1991)

Permitted provisions in ordinances; amendments. - A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

\* \* \*

(c) For the granting of special exceptions under suitable regulations and safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the

right to issue such special exceptions.

(d) For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the county or municipality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, including the ordering in writing of the remedying of any condition found in violation of the ordinance, and the bringing of legal action to insure compliance with the ordinance, including injunction, abatement, or other appropriate action or proceeding.

\* \* \*

Va. Code § 15.1-496 (1989)

**Applications for special exceptions and variances.** - Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application

shall be made to the zoning administrator in accordance with rules adopted by the board. The application and accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board. No such special exceptions or variances shall be authorized except after notice and hearing as required by § 15.1-431. The zoning administrator shall also transmit a copy of the application to the local commission which may send a recommendation to the board or appear as a party at the hearing. The governing body of any county, city or town may provide by ordinance that substantially the same application will not be considered by the board within a specified period, not exceeding one year.

Va. Code § 15.1-499 (1989)

**Restraining, etc., violations of chapter. -**  
Any violation or attempted violation of this

chapter, or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding.

---

## **FAIRFAX COUNTY ZONING ORDINANCE**

**(Reprint 1988; Supp. No. 22, 10/31/88;  
Supp. No. 26, 12/11/89; Supp. No. 27, 3/26/90)**

---

### **GENERAL REGULATIONS (ARTICLE 2)**

#### **PART I 2-100 SCOPE OF REGULATIONS**

\* \* \*

##### **2-102 General Effect**

No structure shall hereafter be erected and no existing structure shall be moved, altered, added to or enlarged, nor shall any land or structure be used or arranged to be used for any purpose other than is included among the uses listed in the following Articles as permitted in the zoning district in which the

structure or land is located, nor shall any land or structure be used in any manner contrary to any other requirements specified in this Ordinance.

\* \* \*

**PART 3      2-300      INTERPRETATION      OF      DISTRICT  
REGULATIONS**

\* \* \*

**2-304      Special Exception Uses**

1. No use of a structure or land that is designated as a special exception use in any zoning district shall hereafter be established, and no existing use shall hereafter be changed to another use that is designated as a special exception use in such district, unless a special exception has been secured from the Board in accordance with the provisions of Article 9.

\* \* \*

## COMMERCIAL DISTRICT REGULATIONS (ARTICLE 4)

### PART 1 4-100 C-1 LOW-RISE — OFFICE TRANSITIONAL DISTRICT

#### 4-101 Purpose and Intent

The C-1 District is established to provide areas where non-retail commercial uses such as offices and financial institutions may be located; to provide for such uses in a low intensity manner such that they can be compatible with adjacent single family detached dwellings; and otherwise to implement the stated purpose and intent of this Ordinance.

#### 4-102 Permitted Uses

\* \* \*

6. Private schools of general education, private schools of special education.

\* \* \*

### PART 2 4-200 C-2 LIMITED OFFICE DISTRICT

**4-201      Purpose and Intent**

The C-2 District is established to provide areas where predominantly non-retail commercial uses may be located such as offices and financial institutions; to provide for such uses in a low intensity manner such that they can be employed as transitional land uses between higher intensity uses and residential uses; and otherwise to implement the stated purpose and intent of this Ordinance.

**4-202      Permitted Uses**

\* \* \*

6. Private schools of general education, private schools of special education.

\* \* \*

**PART 3      4-300 C-3 OFFICE DISTRICT**

**4-301      Purpose and Intent**

The C-3 District is established to provide areas where predominantly

non-retail commercial uses may be located such as offices and financial institutions; and otherwise to implement the stated purpose and intent of this Ordinance.

**4-302 Permitted Uses**

\* \* \*

7. Private schools of general education, private schools of special education.

\* \* \*

**PART 4 4-400 C-4 HIGH INTENSITY OFFICE DISTRICT**

**4-401 Purpose and Intent**

The C-4 District is established to provide areas of high intensity development where predominantly non-retail commercial uses may be located such as office and financial institutions; and otherwise to implement the stated purpose and intent of this Ordinance.

4-402      Permitted Uses

\* \* \*

7. Private schools of general education, private schools of special education.

\* \* \*

PART 5      4-500      C-5      NEIGHBORHOOD      RETAIL  
COMMERCIAL DISTRICT

4-501      Purpose and Intent

The C-5 District is established to provide locations for convenience shopping facilities in which those retail commercial uses shall predominate that have a neighborhood-oriented market of approximately 5000 persons, and which supply necessities that usually require frequent purchasing and with a minimum of consumer travel. Typical uses to be found in the Neighborhood Retail Commercial District include a food supermarket, drugstore, personal

service establishments, small specialty shops, and a limited number of small professional offices.

Areas zoned for the C-5 District should be located so that their distributional pattern throughout the County reflects their neighborhood orientation. They should be designed to be an integral, homogeneous component of the neighborhoods they serve, oriented to pedestrian traffic as well as vehicular. The district should not be located in close proximity to other retail commercial uses.

Because of the nature and location of the Neighborhood Retail Commercial District, they should be encouraged to develop in compact centers under a unified design that is architecturally compatible with the neighborhood in which they are

located. Further, such districts should not be so large or broad in scope of services as to attract substantial trade from outside the neighborhood. Generally, the ultimate size of a C-5 District in a given location in the County should not exceed an aggregate gross floor area of 100,000 square feet or an aggregate site size of ten (10) acres.

**4-502 Permitted Uses**

\* \* \*

10. Private schools of general education, private schools of special education.

\* \* \*

**PART 6 4-600 C-6 COMMUNITY RETAIL COMMERCIAL DISTRICT**

**4-601 Purpose and Intent**

The C-6 District is established to provide locations for retail commercial and service uses which are

oriented to serve several neighborhoods or approximately 20,000 persons. Typical uses to be found in the C-6 District include those uses found in the C-5, Neighborhood Retail Commercial District, and in addition such uses as a variety-department store, a florist, milliner, furniture store, radio and television repair shop, such specialty stores as children's shoes, gifts, candy, lingerie, liquor, women's apparel, book store, children's wear, toys, haberdashery, athletic goods, and a movie theatre.

Development within the district should be encouraged in compact centers that are planned as a unit and preferably confined to one quadrant of an intersection so as to provide for orderly development; maximize comparison shopping; permit

one-stop shopping; minimize traffic congestion; and provide for safe and unimpeded pedestrian movement.

Generally, the ultimate size of a C-6 District in a given location in the County should not exceed an aggregate gross floor area of 400,000 square feet or an aggregate site size of forty (40) acres.

**4-602 Permitted Uses**

\* \* \*

12. Private schools of general education, private schools of special education.

\* \* \*

**PART 7 4-700 C-7 REGIONAL RETAIL COMMERCIAL DISTRICT**

**4-701 Purpose and Intent**

The C-7 District is established to provide locations for a full range of retail commercial and service uses which are oriented to serve a

regional market area containing 100,000 or more persons. The district should be located adjacent to major transportation facilities, and development within the district should be encouraged in centers that are planned as a unit.

Generally, the C-7 District in a given location in the County should contain an aggregate gross floor area in excess of 1,000,000 square feet.

**4-702 Permitted Uses**

\* \* \*

14. Private schools of general education, private schools of special education.

\* \* \*

**PART 8 4-800 C-8 HIGHWAY COMMERCIAL DISTRICT**

**4-801 Purpose and Intent**

The C-8 District is established to provide locations on heavily traveled collector and arterial highways for

those commercial and service uses which (a) are oriented to the automobile, or (b) are uses which may require large land areas and good access, and (c) do not depend upon adjoining uses for reasons of comparison shopping or pedestrian trade.

The regulations of this district are designed to accommodate such uses in a manner that will minimize interference with through traffic movements and insure a high standard in site layout, design and landscaping. Uses should be encouraged to group in preplanned concentrations, and where possible, a minimum distance of three (3) miles should be encouraged between such concentrations.

**4-802      Permitted Uses**

\* \* \*

16. Private schools of general education, private schools of special education.

\* \* \*

## INDUSTRIAL DISTRICT REGULATIONS (ARTICLE 5)

### PART I 5-I01 I-1 INDUSTRIAL INSTITUTIONAL DISTRICT

#### 5-I01 Purpose and Intent

The I-1 District presented herein is designed to set forth, to the extent possible, the provisions of the I-1 District of the Zoning Ordinance of the County of Fairfax, Virginia adopted May 19, 1965, as amended.

#### 5-I02 Permitted Uses

\* \* \*

7. Private schools of general education, limited by the provisions of Sect. I05 below.

\* \* \*

#### 5-I05 Use Limitations

\* \* \*

8. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:
  - A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.
  - B. All vehicular access to the use shall be provided via the internal circulation system of the park.
  - C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

**PART I      5-100 I-1 LIGHT INDUSTRIAL RESEARCH DISTRICT**

**5-101      Purpose and Intent**

The I-1 District is established to provide areas for scientific research, development and training, and offices and manufacturing incidental and accessory to such uses. The district is designed to provide for such uses in a low intensity manner on well-landscaped sites such that they can be located in proximity to residential uses. High performance standards are set forth for the district that will make development within the district compatible with all types of adjoining land uses.

**5-102      Permitted Uses**

\* \* \*

5. Private schools of general

education, limited by the provisions of Sect. 105 below.

\* \* \*

**5-105      Use Limitations**

\* \* \*

7. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

- A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.
- B. All vehicular access to the use shall be provided via the internal circulation system of the park.
- C. It is determined by the

County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

**PART 2 5-200 I-2 INDUSTRIAL RESEARCH DISTRICT**

**5-201 Purpose and Intent**

The I-2 District is established to provide areas for scientific research, development and training, and offices and manufacturing incidental and accessory to such uses. The district is designed to promote a park-like atmosphere for the conduct of research-oriented activities in structures of good design on well-landscaped sites. High performance standards shall be required for this district that will make development within the district compatible with all types of

adjoining land uses.

**5-202 Permitted Uses**

\* \* \*

6. Private schools of general education, limited by the provisions of Sect. 205 below.

\* \* \*

**5-205 Use Limitations**

\* \* \*

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the

use shall be provided via the internal circulation system of the park.

- C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

**PART 3      5-300 I-3 LIGHT INTENSITY INDUSTRIAL DISTRICT**

**5-301      Purpose and Intent**

The I-3 District is established to provide areas for scientific research, development and training, manufacture and assembly of products, and related supply activities. This district is designed to accommodate a broad spectrum of clean industries operating under high performance standards.

5-302 Permitted Uses

\* \* \*

8. Private schools of general education, limited by the provisions of Sect. 305 below.

\* \* \*

5-305 Use Limitations

\* \* \*

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the use shall be provided via

the internal circulation system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

**PART 4      5-400 I-4 MEDIUM INTENSITY INDUSTRIAL DISTRICT**

**5-401      Purpose and Intent**

The I-4 District is established to provide areas for scientific research, development and training, manufacture and assembly of products, and related supply activities. Basically, the provisions of the I-4 District are similar to those of the I-3 District, but with the addition of some higher impact industrial uses.

**5-402      Permitted Uses**

\* \* \*

13. Private schools of general education, limited by the provisions of Sect. 405 below.

\* \* \*

5-405 Use Limitations

\* \* \*

6. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

B. All vehicular access to the use shall be provided via the internal circulation

system of the park.

C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

**PART 5 5-500 I-5 GENERAL INDUSTRIAL DISTRICT**

**5-501 Purpose and Intent**

The I-5 District is established to provide areas where a wide range of industrial and industrially-oriented commercial activities may locate. Uses allowed in this district shall operate under medium performance standards designed to minimize the impact of noise, smoke, glare, and other environmental pollutants on the industries within the district and on the neighboring lands of higher environmental quality. The business

and commercial activities allowed in the district will be those which provide services and supplies primarily to industrial companies, those which engage in wholesale operations, and those which are associated with warehouse establishments.

**5-502 Permitted Uses**

\* \* \*

13. Private schools of general education, limited by the provisions of Sect. 505 below.

\* \* \*

**5-505 Use Limitations**

\* \* \*

8. Child care centers, nursery schools and private schools of general education shall be permitted by right only when:

A. Such use is located in an office or industrial park,

provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.

- B. All vehicular access to the use shall be provided via the internal circulation system of the park.
- C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

## PART 6 5-600 I-6 HEAVY INDUSTRIAL DISTRICT

### 5-601 Purpose and Intent

The I-6 District is established to provide areas for heavy industrial activities with minimum performance

standards where the uses may require that some noise, vibration and other environmental pollutants must be tolerated, and where the traffic to and from the district may be intensive. This district is intended for use by the largest manufacturing operations, heavy equipment, construction and fuel yards, major transportation terminals and other basic industrial activities required in an urban economy.

**5-602 Permitted Uses**

\* \* \*

15. Private schools of general education, limited by the provisions of Sect. 605 below.

\* \* \*

**5-605 Use Limitations**

\* \* \*

7. Child care centers, nursery schools and private schools of

general education shall be permitted by right only when:

- A. Such use is located in an office or industrial park, provided, however, that, notwithstanding the definitions, the requirement for a minimum number of different tenants shall not be applicable.
- B. All vehicular access to the use shall be provided via the internal circulation system of the park.
- C. It is determined by the County Department of Health Services that the location does not pose any hazard to the health, safety and welfare of the children.

\* \* \*

## SPECIAL EXCEPTIONS (ARTICLE 9)

### PART 0 9-000 GENERAL PROVISIONS

#### 9-001 Purpose and Intent

There are certain uses, like those regulated by special permit, which by their nature or design can have an undue impact upon or be incompatible with other uses of land. In addition, there are times when standards and regulations specified for certain uses allowed within a given district should be allowed to be modified, within limitations, in the interest of sound development. These uses or modifications as described may be allowed to locate within given designated zoning districts under the controls, limitations, and regulations of a special exception.

The Board of Supervisors may approve a special exception under the

provisions of this Article when it is concluded that the proposed use complies with all specified standards and that such use will be compatible with existing or planned development in the general area. In addition, in approving a special exception, the Board may stipulate such conditions and restrictions, including but not limited to those specifically contained herein, to ensure that the use will be compatible with the neighborhood in which it is proposed to be located. Where such cannot be accomplished or it is determined that the use is not in accordance with all applicable standards of this Ordinance, the Board shall deny the special exception.

\* \* \*

**9-006 General Standards**

In addition to the specific standards

set forth hereinafter with regard to particular special exception uses, all such uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the adopted comprehensive plan.
2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.
3. The proposed use shall be such that it will be harmonious with and will not adversely affect the use or development of neighboring properties in accordance with the applicable zoning district regulations and the adopted comprehensive plan. The location, size and height of buildings, structures, walls and

fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.

4. The proposed use shall be such that pedestrian and vehicular traffic associated with such use will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood.
5. In addition to the standards which may be set forth in this Article for a particular category or use, the Board shall require landscaping and screening in accordance with the provisions of Article 13.

6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.
7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.
8. Signs shall be regulated by the provisions of Article 12; however, the Board may impose more strict requirements for a given use than those set forth in this Ordinance.

ORDINANCE STRUCTURE, INTERPRETATIONS  
AND DEFINITIONS (ARTICLE 20)

PART 3 20-300 DEFINITIONS

\* \* \*

SCHOOL OF GENERAL EDUCATION: A parochial or private school, or a school for the mentally or physically handicapped giving regular instruction at least five (5) days a week, except holidays, for a normal school year of not less than seven (7) months, but not including (a) a school of special education as defined herein; or (b) a child care center or family day care home unless conducted as part of a school of general education; or (c) a riding school, however designated.

\* \* \*

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WARREN E. ISMAN,  
FAIRFAX COUNTY FIRE  
MARSHAL, et al.,

Complainants,

v. IN CHANCERY NO. 108263

ROBERT L. THOBURN  
et al.,

Respondents.

DECREE

THIS MATTER came on before the Court on September 13, 1988, for a further hearing on Complainants' Bill of Complaint for Declaratory Judgment and Injunctive Relief filed with this Court on September 1, 1988; and

IT APPEARING TO THE COURT that Respondents received copies of the Bill of Complaint for Declaratory Judgment and Injunctive Relief, that a preliminary hearing thereon was held September 2, 1988, that a

consent Decree was entered on September 2, 1988 whereby a preliminary injunction was granted, that this hearing was set by agreement of the parties with Respondents to file their response by noon on September 12, 1988, and the parties appeared and were represented by counsel before this Court; and

IT FURTHER APPEARING TO THE COURT after hearing evidence that an Injunction should be granted for the reasons stated on the record and as set forth herein as follows:

1. The case is before the Court on the Petition of the Fairfax County Officials named herein for a temporary injunction, enjoining the Respondents from opening a school.

2. The first issue before the Court for determination is a balancing of hardships. The Respondents contend that there are three hundred prospective students who will be attending this school, that they face prospects of attending no school or being educated at home, or being called on to

compromise their religious beliefs if they were compelled to attend a public school. This must be balanced against the health, the safety and the welfare of those students who will be attending this particular facility. The burden is on the Respondents to show that in no way will the health, safety and welfare of the children be subjected to hazardous conditions. The Respondents have failed to do that. The students would be placed in a hazardous situation; which would be a danger to their health, to their safety and to their welfare. The Respondents are responsible for creating this situation in that they have failed to comply with state and local law.

3. The second issue is the First Amendment freedom of religion issue. The state and county have a compelling interest to protect by law the health, safety and welfare of these children. The testimony of the Respondents' experts and the testimony of the Complainants' witnesses do not show the

facilities to be safe at this time. The Court cannot compromise the safety of these children on the basis of what may be done in the future to improve the facilities and bring them into compliance with local safety laws.

4. The third issue is the equal protection issue. The County law does distinguish between public and private schools but no mention is made of a parochial or sectarian school. Although public schools are not required to obtain a special exception in order to operate, they are subject to various statutory requirements, including, most importantly, public hearings before their locations can be determined and be approved. This requirement for public school sites is equally burdensome to the requirement which is placed on private schools to obtain a special exception permit.

WHEREFORE, upon consideration of these determinations, it is ORDERED and DECREED that:

1. The Respondents, their agents and

employees are hereby enjoined from any further construction activity on the subject property until such time as they secure the proper approval and permits from the appropriate county board, agencies and officials; and

2. The Respondents, their agents and employees are further enjoined from occupying or permitting the occupancy of the residential structures at 1620, 1624 and 1628 Hunter Mill Road, in Fairfax County, for school purposes until further order of the Court.

THIS CAUSE IS CONTINUED.

ENTERED this 27th day of September,  
1988.

/SIGNED/  
LEWIS HALL GRIFFITH  
JUDGE

WE ASK FOR THIS:

DAVID T. STITT  
COUNTY ATTORNEY

By /SIGNED/  
Karen J. Harwood  
Assistant County Attorney  
4100 Chain Bridge Road  
Fairfax, Virginia 22030  
(703) 246-2421  
Counsel for Complainants, Warren E.  
Isman, Fairfax County Fire Marshal;  
Claude G. Cooper, Director, Fairfax  
County Department of Environmental  
Management; and Jane W. Gwinn, Fairfax  
County Zoning Administrator

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

1. The Decree violates Respondents' rights to free exercise and religion.
2. The Decree violates Respondents' rights to equal protection of the law.
3. The Decree violates Respondents' First and Fourteenth Amendment rights to freedom of speech.
4. The Decree violates Respondents' First and Fourteenth Amendment rights to freedom of association.

5. The Decree violates Respondents' Fourteenth Amendment rights of Substantive Due Process to operate a private school for the benefit of parents and children in the community.

6. The Decree violates the prohibition against prior restraint on freedom of speech, freedom of association, and right to a private education.

7. The Decree violates Respondents' rights because the ordinance is excessively over broad and vague on its face and as applied, and it delegates unfettered discretion to County officials in violation of Respondents' Fourth and Fifth Amendment rights.

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In The  
Supreme Court Of The United States

OCTOBER TERM, 1991

CHRIST COLLEGE, INC., *et al.*,

*Petitioners,*

v.

BOARD OF SUPERVISORS,  
FAIRFAX COUNTY, VIRGINIA, *et al.*,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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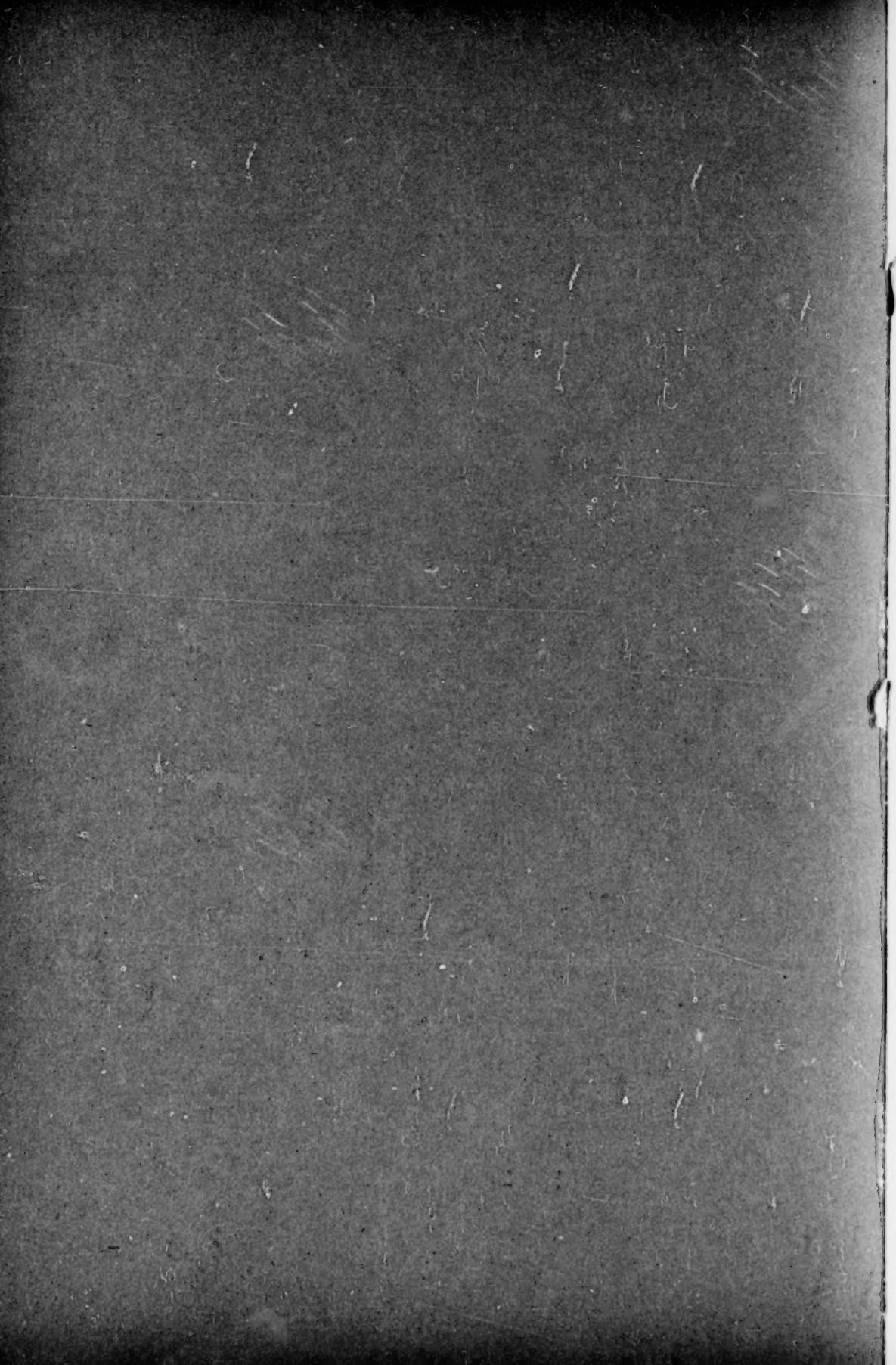
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Supreme Court, U.S.

FILED

JAN 16 1992

OFFICE OF THE CLERK



## QUESTIONS PRESENTED

1. Whether the Panel of the Court of Appeals below erred in holding that the compelling state interest balancing test of Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny, should not be utilized to determine the validity of the actions taken by Town of Vienna, Virginia and the Vienna Board of Zoning Appeals in this case.
2. Whether the Panel of the Court of Appeals below failed to analyze the Thoburns' Free Exercise Claim as an "as applied" challenge to a facially neutral zoning ordinance, building code and fire code.
3. Whether the Panel of the Court of Appeals below erred in determining that the actions of the Town of



**QUESTIONS PRESENTED - Continued**

Vienna, Virginia and the Vienna Board of Zoning Appeals did not impose a burden upon the exercise of religion by the Thoburns.

4. Whether the Panel of the Court of Appeals below erred in determining that the Vienna Board of Zoning Appeals did not violate the Establishment Clause by imposing the conditions contained in the May, 1989 Conditional Use Permit issued to the Thoburns.



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**CONSTITUTIONAL, STATUTORY AND REGULATORY  
PROVISIONS INVOLVED**

U.S. Const. Amend. I

42 U.S.C. § 1983<sup>1</sup>

Vienna, Va. Town Code § 18-209

Vienna, Va. Town Code § 18-210<sup>2</sup>

**STATEMENT OF THE CASE**

Petitioners Robert Thoburn, owner of the Fairfax Christian School ("FCS"), members of the Thoburn family, Glen and Judy Dryden, parents of two (2) students, and Christ College, Inc., filed this suit pursuant to 42 U.S.C. § 1983 on August 1,

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<sup>1</sup>The text of U.S. Const. Amend. I and 42 U.S.C. § 1983 are set forth verbatim in the Appendix to the Petition for Writ of Certiorari.

<sup>2</sup>The text of Vienna, Va. Town Code § 18-209 and Vienna, Va. Town Code § 18-210 are set forth verbatim in the Appendix to this Brief.

1989.<sup>3</sup> Petitioners claimed violations of the First and Fourteenth Amendments to the United States Constitution. Specifically, Petitioners claimed violations of their rights to free exercise of religion, violations of the Establishment Clause, equal protection and due process. Petitioners named as defendants the Fairfax County Board of Supervisors ("Board"), the individual members of the Board, the Fairfax County Executive,<sup>4</sup> the Town of Vienna ("Vienna") and the Vienna Board of Zoning Appeals ("Vienna BZA").<sup>5</sup>

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<sup>3</sup>The Thoburns and Drydens will be collectively referred to herein as "the Thoburns."

<sup>4</sup>The Fairfax County Respondents will be collectively referred to herein as "the County."

<sup>5</sup>Christ College, Inc. brought no claims against the Town of Vienna, Virginia or the Vienna Board of Zoning Appeals in the District Court.

Trial commenced on May 7, 1990 and ended on May 9, 1990 when the United States District Court for the Eastern District of Virginia, Alexandria Division ("District Court"), granted the County, Vienna and Vienna BZA's Motions for Directed Verdicts. Joint Appendix in the United States Court of Appeals for the Fourth Circuit ("J.A.") at 2067-72.

A panel of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed the dismissal by Unpublished Opinion dated September 13, 1991. Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 1a. Petitioners' evidence in the District Court revealed the following facts.

Robert Thoburn started FCS in 1961 in what was then the Town of Fairfax. (J.A. 1518, 1589). FCS was located on commercial property and secured annual

zoning permits. (J.A. 1589-90). The Thoburns presented no evidence at trial to establish that this property, or any other, had any religious significance for them. FCS is and has been a for-profit business enterprise since its inception and is not tax exempt. (J.A. 1595-96, 1617, 3216).

FCS moved to Fairfax County in 1964, after securing a special permit for property located on Pope's Head Road from the Fairfax Board of Zoning Appeals ("County BZA"). (J.A. 1519-20, 3206-08). The Thoburns, at a later time, secured additional special permits from the County BZA to expand the size of FCS. (J.A. 1520, 1590, 3210-12, 3214, 3217, 3265-72). The Thoburns conducted devotion classes in classrooms at the Pope's Head Road property. (J.A. 1652).

The Fairfax County Zoning Ordinance requires that private schools of general education, such as FCS, secure approval of a special exception ("SE") from the Board to operate with 100 or more students on property zoned for residential uses. (J.A. 1530-31). The Vienna Zoning Ordinance requires all private colleges and schools of a non-commercial nature to obtain a Conditional Use Permit to operate in Vienna. (J.A. 1661; Appendix at 1a).

In February, 1985, the Thoburns purchased approximately fifty-nine (59) acres of property in the Oakton area of Fairfax County. (J.A. 3278-79). The Thoburns implicated the County Zoning Ordinance by submitting an SE Application for FCS in 1985 for 576 students on 37.51 acres of the Oakton property. (J.A. 3281, 3289, 3293). For various reasons, the

Board did not approve the SE. (J.A. 1534-35, 3323-27).<sup>6</sup>

On February 3, 1987, the Thoburns filed a second SE Application for FCS for the Oakton property. (J.A. 1535-37). On August 3, 1987, the Board of Supervisors denied the Thoburns' second SE Application after holding a public hearing. (J.A. 1537, 3377-3503).<sup>7</sup>

After the sale of the Pope's Head Road property, Thoburn leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as

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<sup>6</sup>A more detailed discussion of the Thoburns' initial SE Application for the Oakton property is presented in the County Respondents' Statement of the Case contained in their Brief in Opposition to Petition for Writ of Certiorari.

<sup>7</sup>A more detailed discussion of the Thoburns' second SE Application for the Oakton property is presented in the County Respondents' Statement of the Case contained in their Brief in Opposition to Petition for Writ of Certiorari.

interim sites for FCS. (J.A. 1171, 1525-26, 3280). The leases for the sites were for terms of one (1) year. (J.A. 3375-76, 3507-08). Jerusalem Baptist did not renew the lease. (J.A. 1547).

In late August 1988, after the County performed, at the Thoburns' request, a team inspection on two (2) houses located on Hunter Mill Road in Fairfax County, the Thoburns told Fairfax County executives that they intended to open FCS without an SE at the property. (J.A. 1554-55). On September 1, 1988, the County Fire Marshal, the Building Official and the Zoning Administrator filed suit in the Fairfax County Circuit Court to prevent the Thoburns from opening FCS at Hunter Mill without an SE and in violation of the building code. (J.A. 1175, 1241, 1862-63). The Circuit Court ruled for the County. (J.A. 1867-68).

After the issuance of the injunction, the Thoburns located their entire school (225 students, grades K-12) in Vienna at the Vienna Assembly of God Church (hereinafter "VAGC"). (J.A. 1560). The VAGC is located in a commercial area and one-half of its property is zoned for commercial uses. (J.A. 1560, 1667, 1848-50). Vienna is a Town in Fairfax County with a Town Council, separate Board of Zoning Appeals and a separate Zoning Ordinance. Since 1966, County officials have provided building inspections in Vienna. (J.A. 1799-1800, 2631-32).

In May, 1988, prior to locating the entire FCS at VAGC, the Thoburns requested a team inspection of VAGC. (J.A. 1690). The Thoburns requested the inspection because they knew that the building would have to be brought into compliance with building and fire codes before FCS could

lawfully operate there. (J.A. 1660). County officials made a team inspection of the VAGC for the Thoburns in May 1988 for 49 students. (J.A. 1640-42, 1659-61, 2198-2202).

In May 1988, the Thoburns applied for a Conditional Use Permit for 49 students, grades K-1, for the VAGC basement. (J.A. 1690). On July 20, 1988, the Vienna BZA approved FCS's application for a Conditional Use Permit for 49 students, grades K-1, for the VAGC basement. (J.A. 1662-63, 3809).

On September 19, 1988, the Thoburns applied for a Temporary Conditional Use Permit for 175 more students at the VAGC. (J.A. 1673). The next day, with no approval of the request for 175 additional students and no occupancy approval for even 49 students, and without consulting the Fire Marshal, the Thoburns moved their

entire school onto all floors of the VAGC. (J.A. 1560, 1643-44, 1694, 1780, 1782-88). The Thoburns knew such action violated their July, 1988 Conditional Use Permit. (J.A. 1644, 1778-79).

On September 21, 1988, County fire officials inspected the VAGC at the Town's request. County Fire Technician Timothy Sparrow ordered FCS to evacuate the VAGC premises based upon various violations of the applicable building and fire codes. (J.A. 1677, 1793-95, 1801). The Thoburns presented no evidence in the District Court as to the governmental capacity under which Fire Technician Sparrow was acting when he issued the Evacuation Order. The Thoburns refused to comply with the Evacuation Order and opened the school the next day. (J.A. 1647-48, 1783, 1791).

The Thoburns' own expert inspected the VAGC on September 22, 1988 and determined that numerous building code and fire code violations existed at the site for the Thoburns' use of the premises.

(J.A. 1897, 3794-3802). The expert testified at trial that significant and serious code violations impaired the safety of the occupants of the VAGC, and that "a reasonable inspector could note the accumulative (sic) code issues and looked (sic) to issue an evacuation order." (J.A. 1919-21, 3794-3802).

Vienna sought and was granted an injunction from the Fairfax County Circuit Court to preclude further FCS operations at the VAGC without all necessary permits and approvals. (J.A. 1179-81). FCS continued to operate at the VAGC with over 200 students until the injunction ruling of the Circuit Court. (J.A. 1649).

FCS was allowed to occupy the VAGC with 49 students on September 29, 1988, and with all students two weeks later, once the Thoburns had substantially complied with all zoning ordinance, building code and fire code requirements. (J.A. 1182, 1681, 1714, 1753). The Thoburns presented no evidence at trial to show that County attorneys worked with Vienna attorneys on the injunction case.<sup>8</sup> The Thoburns further presented no evidence at trial to show that Vienna has any control over County public schools.

The Vienna BZA issued a permanent Conditional Use Permit to the Thoburns in May, 1989 for a maximum of 174 students, grades K-12. The Permit was limited to permanent classroom facilities on the

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<sup>8</sup>The Thoburns' conspiracy claim was not argued in the Fourth Circuit and is not included in their Petition.

first and second levels of the VAGC, and overflow room and musical instruments within the sanctuary. (J.A. 1701). The curriculum of FCS, including the holding of devotion classes, has not been affected by the issuance of the May, 1989 Conditional Use Permit. (J.A. 1652).

#### **SUMMARY OF ARGUMENT**

In their Petition, the Thoburns essentially argue that the Fourth Circuit erred in determining not to apply a compelling state interest analysis to the various governmental actions of the Vienna Respondents. The Fourth Circuit, after an extensive review of the District Court record, determined that none of the actions of the Vienna Respondents imposed a burden upon the Thoburns' exercise of religion. The Fourth Circuit's decision in this regard was in keeping with this Court's relevant First Amendment precedent

and is not in conflict with any decisions of other Circuit Courts of Appeals.

The Thoburns' evidence in the District Court, as reviewed by the Fourth Circuit, clearly revealed that there was no nexus between the actions of the Thoburns which were subject to governmental regulation and any religious beliefs of the Thoburns. Absent such a nexus, the Fourth Circuit correctly concluded that it need not apply a compelling state interest balancing test to determine the validity of the governmental actions involved. Furthermore, the Fourth Circuit correctly concluded that it need not reach the issue of whether the Thoburns' claim was "hybrid" inasmuch as the Thoburns had not presented any evidence to show that their Free Exercise rights were burdened. Thus, the Fourth Circuit concluded that the

actions of the Vienna Respondents simply did not implicate the Thoburns' Free Exercise rights.

The Fourth Circuit further ruled that the conditions contained in the May, 1989 Conditional Use Permit issued by the Vienna BZA did not violate the Establishment Clause. It did so after a thorough examination of the District Court record. Such review revealed a lack of any evidence to show that the actions of the Vienna BZA were anything but secular in nature or affected anyone's religious practices. The Fourth Circuit thus correctly concluded that no Establishment Clause violation existed.

## ARGUMENT

- I. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE COMPELLING STATE INTEREST BALANCING TEST OF SHERBERT V. VERNER, 374 U.S. 398 (1963), AND ITS PROGENY, SHOULD NOT BE USED TO DETERMINE THE VALIDITY OF THE ACTIONS OF THE TOWN OF VIENNA, VIRGINIA AND THE VIENNA BOARD OF ZONING APPEALS IN THIS CASE

The Thoburns argue in Section I of their Petition that the Fourth Circuit erred in refusing to analyze their Free Exercise claim under the "compelling state interest" balancing test of Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny. The Thoburns urge that this case involves "hybrid" rights which warrants the application of Sherbert's compelling state interest analysis. The Fourth Circuit declined to apply the compelling state interest test, finding, inter alia, that the Thoburns had failed to establish that the actions of Vienna and the Vienna

BZA had placed a burden on their exercise of religion.

It is axiomatic that the freedom to hold religious beliefs is absolute. See Cantwell v. Connecticut, 310 U.S. 296 (1940). However, the freedom to act in consequence of religious beliefs is not absolutely protected. In this regard, this Court has stated:

[The First Amendment] embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definitions to preserve the enforcement of that protection.

Cantwell, 310 U.S. at 303-304. See also Reynolds v. United States, 98 U.S. 145 (1878).

Governmental conduct which imposes a substantial burden on an individual's

exercise of religion must be justified by a compelling state interest. Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, there must be a nexus between the religious belief of an individual and action taken by such individual purportedly regulated by the State in order to implicate a Free Exercise analysis. See Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972). Sherbert, 374 U.S. at 404.

An individual must show a substantial burden on his ability to carrying out his religious beliefs as a prerequisite to a judicial determination of whether the government has an interest which overrides the individual's Free Exercise claim for exemption from government regulation. "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program

unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985).

Most recently, this Court, in Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990), again emphasized that no compelling state interest analysis is required if the challenged action does not place a substantial burden on the exercise of religion. "[T]he Free Exercise inquiry asks whether government has placed a substantial burden on the observation of essential religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." 493 U.S. at 384-85 [quoting

Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)].

Amidst the Thoburns' argument that this Court's holding in Employment Division, Department of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990), dictated that the Fourth Circuit analyze their Free Exercise claim as one involving "hybrid rights" allegedly requiring a compelling state interest analysis, the Fourth Circuit specifically held that the Thoburns failed to establish that any of the zoning ordinances or safety codes involved in this matter burdened the Thoburns' exercise of religion. (Petitioners' Appendix at 8a). The Fourth Circuit found that there was no need to decide whether the Thoburns' claim was indeed a "hybrid" under Employment Division as the Thoburns ". . . failed to establish the first element in any Free

Exercise claim. They have not proved that the zoning laws or fire codes burdened their exercise of religion." (Petitioners' Appendix at 8a).

With respect to the Thoburns' actions at the VAGC, the evidence was undisputed that the Thoburns realized that they would need to comply with the applicable zoning ordinance, building code and fire code before FCS could begin operation at VAGC. To this end, the Thoburns made application for a Conditional Use Permit to operate FCS at VAGC with 49 or less students, grades K-1, in the basement of VAGC prior to opening the school. The Thoburns also requested a team inspection at VAGC by various County personnel prior to opening the school, as they knew the building would have to meet the applicable building and fire codes before operation could commence.

The Thoburns were granted a Conditional Use Permit in July, 1988 to operate FCS in VAGC basement, grades K-1, with a maximum of 49 students. It is undisputed that in September, 1988, the Thoburns moved the entire FCS into the VAGC facility in violation of their July, 1988 Conditional Use Permit. The Thoburns' actions in this regard were taken with the full knowledge that they were violating their Conditional Use Permit.

An inspection of the VAGC was effected by Fairfax County Fire Technician Timothy Sparrow, who noted numerous building and fire code violations in the facility. Mr. Sparrow then issued an Evacuation Order to the Thoburns. The Thoburns presented no evidence at trial to show that Mr. Sparrow was a policymaker for Vienna when he issued the Evacuation

Order, or that he was carrying out Vienna Policy when he issued the Order. Thus, municipal liability for the act could not be established. See City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).

The Thoburns' own expert at trial testified that numerous building and fire code violations existed at the VAGC when the Thoburns moved the entire FCS into the facility. The expert testified that such violations significantly impacted on the safety of the occupants of the building.

It is undisputed that the Thoburns ignored the Evacuation Order and continued to operate the school in violation of their Conditional Use Permit, the Vienna Zoning Ordinance, as well as applicable building and fire codes. Even after Vienna filed its Petition for Injunction in the Circuit Court of Fairfax County, the Thoburns continued operating the

entire FCS at the VAGC. It was not until the Fairfax Circuit Court granted Vienna's Petition for Injunction that the Thoburns ceased to operate FCS at the VAGC.

The undisputed evidence in the District Court showed that the conduct taken by the Thoburns was simply conduct in violation of applicable State and local laws. Such conduct was not taken pursuant to religious beliefs. The Thoburns presented no evidence in the District Court to show that they held a religious belief that they could operate FCS in violation of applicable building, fire and zoning laws, or that they could not comply with such laws because of their religious beliefs. Furthermore, the Thoburns presented no evidence in the District Court to show that they held a religious belief that they could operate FCS in contravention of a lawfully issued

Evacuation Order. Such, however, was exactly the nature of the Thoburns' conduct regulated in this matter.

The evidence was uncontroverted that the Thoburns implicated the Conditional Use Permit processes by filing applications for Conditional Use Permits in May of 1988, September of 1988 and March of 1989. Clearly, the Thoburns realized that, even though they were operating a religious school, they still had to comply with the Vienna Zoning Ordinance.

Furthermore, the actions of the Thoburns indicate that they realized that the school must also comply with applicable building and fire codes to operate at the VAGC. The evidence was uncontroverted that the Thoburns requested a team inspection of the VAGC by Fairfax County personnel in both May of 1988 and

September of 1988 to determine what remedial actions would be necessary to bring the building into compliance with the applicable safety codes. The Thoburns' evidence was replete with indications of efforts they took to bring the VAGC into compliance with the codes after they had unlawfully moved the entire FCS into the facility.

The Thoburns do not contend that FCS may be operated irrespective of compliance with applicable State and local law, nor do they have a religious belief that compels them to do so. It was, however, the conduct of the Thoburns in attempting to operate FCS in violation of applicable zoning ordinances and safety codes which prompted the subject Evacuation Order and Injunction Suit.

The Fourth Circuit correctly recognized that the Thoburns had failed to

establish any nexus between the subject governmental regulation in this case and the impairment of the ability of the Thoburns to carry out a religious mission. The conduct being regulated simply had no relationship to religious beliefs of the Thoburns. Compare Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the impact of a compulsory school attendance law affirmatively compelled Yoder to perform acts undeniably at odds with the fundamental tenets of his religious beliefs). Once the Thoburns substantially complied with applicable zoning, building and fire laws, they were permitted to operate FCS at the VAGC.

Similarly, the Thoburns presented no evidence at trial to show that the operation of FCS at the VAGC building itself had any religious significance to them. The evidence was undisputed that

the conditions contained in the May, 1989 Conditional Use Permit did not alter the curriculum of FCS. The Conditional Use Permit was purely secular in nature. The Permit did not forbid anyone from praying, conducting devotions or otherwise exercising their religious beliefs. FCS had operated for years in non-church facilities and regularly conducted devotion classes in classrooms. Thus, no burden was placed upon the Thoburns' exercise of religion by the conditions contained in the May, 1989 Conditional Use Permit.

The Thoburns argue that other Federal Courts of Appeals have recognized alleged "hybrid" claims of free exercise, in an apparent attempt to argue that the Fourth Circuit has rendered a decision in conflict with other Circuit Courts of Appeals. The basis for such an argument

is unclear inasmuch as the Fourth Circuit specifically held that it need not decide whether the Thoburns' claim was "hybrid". The Fourth Circuit has rendered an opinion in keeping with the precedent of this Court, avoiding any discussion of hybrid rights, given the nature of the evidence presented in the District Court.

This Court in Employment Division, supra, recognized that there was a danger in imposing a compelling state interest analysis to religion-neutral, generally applicable laws. In this regard, this Court stated:

To make an individual's obligation to obey such a law contingent upon the laws' coincidence with his religious beliefs, except where the State's interest is "compelling" - permitting him, by virtue of his beliefs, "to become a law unto himself" - contradicts both constitutional tradition and common sense.

Employment Division, 110 S. Ct. at 1603  
(citation omitted)

This Court has consistently dismissed appeals for want of substantial federal question in cases upholding the validity of zoning ordinances which either excluded churches or religious schools from, or required zoning permits in, certain zoning districts. See, e.g., Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), appeal dismissed, 450 U.S. 902 (1981) (refusal to permit school to operate in church building in residential zone).

The actions of the Thoburns regulated by Vienna in this matter were not religiously motivated. Said regulation was merely the response to the unlawful actions of the Thoburns which were motivated solely by business reasons. The actions of the Vienna BZA were secular

actions taken pursuant to the Vienna Zoning Ordinance. By the Thoburns' own evidence, said actions did not burden their exercise of religion.

Thus, the Fourth Circuit correctly affirmed the District Court's dismissal of the Thoburns' Free Exercise claim. The Fourth Circuit did so without the need of determining whether the Thoburns' claim was of a "hybrid" nature. Therefore, the Thoburns' contention that the Fourth Circuit's Opinion in this case has created a conflict among the Circuits on the issue of "hybrid" rights is without merit.

**II. THE PANEL OF THE COURT OF APPEALS BELOW ANALYZED THE THOBURNS' FREE EXERCISE CLAIM AS AN "AS APPLIED" CHALLENGE TO THE ZONING ORDINANCES, BUILDING CODE AND FIRE CODE INVOLVED IN THIS CASE**

In Section II of their Petition, the Thoburns contend that the Fourth Circuit did not recognize their claims as an "as

applied" challenge to the zoning ordinances, building and fire codes involved in this matter. The Thoburns state in their Petition that they initially pled a facial challenge to the subject zoning ordinances, building and fire codes in their pleadings in the District Court as well as an "as applied" challenge. (Petition at 20, n. 17). The Thoburns argue that the Free Exercise Count of their Second Amended Complaint was "devoted almost exclusively to alleging that the 'actions' and 'pattern of conduct' of [Respondents] under color of State law had the 'effect' of burdening [the] exercise of their religious beliefs." (Petition at 21, quoting Second Amended Complaint).

It is submitted that the Fourth Circuit did analyze the Thoburns' claims as an "as applied" challenge to the

subject zoning ordinances, building and fire codes. The Fourth Circuit recognized that this Court's opinion in Sherbert v. Verner, 374 U.S. 398 (1963) ". . . was ground-breaking in that it recognized for the first time that a governmental action which was facially neutral, but had the effect of impairing the free practice of religion, would receive strict scrutiny." (Appendix at 7a). The Fourth Circuit then undertook a detailed analysis of whether the subject laws, as applied, had the effect of burdening the Thoburns' exercise of religion. The Fourth Circuit did not undertake to decide whether Sherbert was still viable under Employment Division, supra, because it did not find that the subject zoning ordinances or building and fire codes, or actions taken by the Vienna Respondents thereunder, burdened the Thoburns' exercise of religion.

The Fourth Circuit also addressed the Thoburns' argument that the subject zoning ordinances, building and fire codes had been applied discriminatorily against them under the Equal Protection theory plead by the Thoburns. (Petitioners' Appendix at 10a).<sup>9</sup> Thus, the Thoburns were afforded ample opportunity in both the District Court and the Fourth Circuit to make their "as applied" challenge.

There is simply no merit to the Thoburns' contention that the Fourth Circuit misunderstood their Free Exercise theory, in general, or their discrimination argument, in particular. The Fourth Circuit simply found that the subject zoning ordinances, building and fire codes, even in their application, did

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<sup>9</sup>Petitioners have not raised an Equal Protection argument in their Petition.

not burden the Thoburns' exercise of religion.

The Fourth Circuit has not rendered an opinion on this issue in conflict with other Circuits. The Fourth Circuit has, in fact, rendered an opinion on this issue in direct keeping with this Court's relevant precedent.

**III. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE SUBJECT ACTIONS OF THE TOWN OF VIENNA, VIRGINIA AND THE VIENNA BOARD OF ZONING APPEALS DID NOT IMPOSE A BURDEN ON THE THOBURNS' EXERCISE OF RELIGION**

The Thoburns, in Section III of their Petition, contend that the Fourth Circuit erred in concluding that the actions taken by Vienna and the Vienna BZA in this case did not impose a burden on the Thoburns' exercise of religion. Curiously, the Thoburns appear to acknowledge that the Fourth Circuit never needed to reach the question of whether the case presented a

"hybrid" right situation because it found no burden on the Thoburns' exercise of religion by the governmental conduct in question. In light of the arguments contained in Section III of the Petition, the Thoburns cast doubt on the arguments contained in Section I of their Petition.

As set forth in Section I, supra, this Court has consistently required that an individual make a showing that the government regulated conduct taken pursuant to religious beliefs before the Sherbert balancing test should be applied. Both the District Court and the Fourth Circuit have reviewed the Thoburns' evidence at trial and have determined that the Thoburns presented no evidence to show that Vienna or the Vienna BZA regulated conduct taken pursuant to religious beliefs.

The Thoburns had no religious belief that they could operate FCS without complying with the applicable zoning ordinance and building/fire codes. To the contrary, the evidence was clear that the Thoburns systematically identified the acts necessary to comply with such laws and took steps to comply with the same until they determined that it was not in their economic interest to do so. When the Thoburns took it upon themselves to violate applicable law, conduct not taken pursuant to religious beliefs, they were subjected to the regulations of which they complain in this action.

Similarly, the Thoburns presented no evidence at trial to show that any building which they used, or attempted to use, to house FCS had any religious significance to them. Thus, the subject zoning ordinance, building code and fire

code which, as applied, were building specific, did not burden the Thoburns' exercise of religion.

The Thoburns wish this Court to compare the evidence presented in this case with evidence presented in other cases, including state court cases, to determine if there is a conflict between the Circuit Courts of Appeals on the issue of burden. The Thoburns fail to recognize that the determination of whether a burden exists upon an individual's exercise of religion is inextricably intertwined with the facts of a particular case. Two courts have now reviewed the Thoburns' evidence at trial and have concluded that the Thoburns failed to meet their burden of proof on this central issue.

This case cannot be compared with others in an attempt to create "a conflict between the Circuits." The Fourth Circuit

simply reviewed the Thoburns' evidence presented at trial, and in keeping with this Court's relevant precedent, dismissed the Thoburns' Free Exercise claim.

**IV. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE VIENNA BOARD OF ZONING APPEALS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE BY IMPOSING THE CONDITIONS CONTAINED IN THE MAY, 1989 CONDITIONAL USE PERMIT ISSUED TO THE THOBURNS**

The Thoburns contend in Section IV of their Petition that the Vienna BZA violated the Establishment Clause by imposing certain conditions in the May, 1989 Conditional Use Permit issued to the Thoburns for the VAGC.

This Court's interpretation of the Establishment Clause is fully set forth in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1951), to-wit:

Neither a state nor the federal government can set up a Church. Neither can pass laws which aid one religion over another. Neither can force or influence a

person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs or for church attendance or nonattendance. . . .Neither a state nor the Federal Government can operate or secretly participate in affairs of any religious organization or groups and vice versa.

Id. at 210-211. See also Everson v. Board of Education, 330 U.S. 1 (1947).

It is well settled that the Establishment Clause does not exempt religious organizations from secular governmental activities such as zoning regulations, fire inspections and building and regulations. See Tony and Susan Alamo Foundation, supra. See also Lemon v. Kurtzman, 403 U.S. 602 (1971). The Thoburns presented no evidence at trial to show that the conditions placed by the Vienna BZA in the May, 1989 Conditional

Use Permit addressed anything but secular concerns or were beyond the BZA's legal authority to impose such conditions. Furthermore, the Thoburns' own evidence indicated that the conditions placed in the Permit did not affect the curriculum of the FCS or otherwise interfere with the Thoburns' religious beliefs or practices.

Upon the evidence in the District Court, or lack thereof, both the District Court and the Fourth Circuit found no Establishment Clause violation. Despite the Thoburns' emotive and argumentative presentation of this issue in this Petition, it is clear that their Establishment Clause claim was dismissed simply for a failure to present the necessary proof of an Establishment Clause violation.

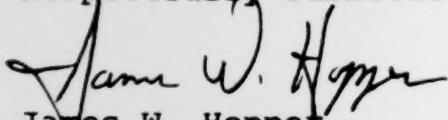
The Vienna BZA did not prohibit any FCS teachers or students from attending

religious classes, engaging in Bible study, saying prayers, conducting devotions, or otherwise conducting the affairs of FCS. The issuance of the Permit was a secular act taken pursuant to the Vienna Zoning Ordinance. The Thoburns presented no evidence to the contrary. The Fourth Circuit thus correctly affirmed the dismissal of the Thoburns' Establishment Clause claim.

**CONCLUSION**

**WHEREFORE**, based upon the foregoing, these Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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Dated: January 15, 1992

## APPENDIX

### Article 21

#### Conditional Use Permits

18-209      Use Permit Subject to Certain Conditions. The Board of Zoning Appeals may issue a use permit for any of the uses enumerated in § 18-210 in response to an application therefor, provided the use for which the permit is sought will not (1) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use, (2) will not be detrimental to the public welfare or injurious to property or improvements in the

neighborhood, and (3) will be in accord with the purposes of the Master Plan of the Town of Vienna. In granting any use permit the Board of Zoning Appeals may impose such conditions in connection therewith as will assure that the use will conform to the foregoing requirements and that it will continue to do so, and may require a guarantee or bond to insure that the conditions imposed are being and will continue to be complied with.

18-210      Use Permits Required.    A use permit is required for any of the following uses.    (See regulations for Zone in which the use is proposed to be located):

- A. Amusement enterprises, if conducted wholly within an enclosed building, provided that the existence and location of the same shall not impose a deleterious effect upon the Town and that permits therefor shall insure compatibility with land use policies embodied in the Town zoning ordinances. (Amen 4-4-83)
- B. Auditoriums and halls.
- C. Auto sales.
- D. Bowling alley.
- E. Carpenter or general woodworking shop (excluding outdoor storage).
- F. Cemeteries.
- G. Colleges and Schools (Private, Elementary and

High) of a non-commercial nature.

- H. Concrete mixing plants.
- HH. Minute Car Wash Stations.  
(Amen. 5-10-71)
- I. Contractor's equipment storage yard or plant, or rental of equipment commonly used by contractors.
- J. Draying, freighting, or trucking yard or terminal.
- K. Farm or gardening implement, sales and service.
- L. Feed and Fuel Yard.
- M. Funeral Homes.
- N. Golf courses, country clubs, private clubs, including community buildings and similar

recreational uses not owned  
and/or operated by a public  
agency. (Does not include  
golf driving ranges.)

- O. Hospitals, sanitariums and  
clinics which are an  
integral part of such  
hospitals and clinics  
providing treatment for  
mental or behavioral  
disorders as out-patient  
counseling or therapeutic  
facilities only; and  
provided that such clinics  
if not an integral part of  
a hospital or sanitarium be  
formally affiliated with  
such hospital or sanitarium  
or such other  
governmentally sponsored  
organization that provides

counseling for mental or behavioral disorders.

(Amended 6-2-80)

Notwithstanding any of the above, all clinics and facilities not an integral part of a hospital or sanitarium and treating contagious diseases, drug or alcohol addicts or abusers, sex offenders, felons, or persons suffering from psychosis, anti-social personality disorders or explosive personality disorders are not permitted regardless of whether such facility operates an in-patient or out-patient facility,

counseling or therapeutic facility or otherwise.

(Amended 6-2-80)

Animal hospitals not providing boarding facilities other than for hospitalization to provide medical and/or surgical care for the patient are likewise subject to procurement of a use permit. However, animal hospitals providing boarding facilities not directly associated with immediate medical and/or surgical care for the patient are not permitted.

(Amen 6-2-80)

P. Hotel and Motel. (Amen.

12-6-71)

Q. Institutional home and institutions of an educational or philanthropic nature, except those of a correctional nature or for mental cases.

R. Nursery and kindergarten schools (private).

S. Outdoor amusement enterprises.

T. Pet shop.

U. Plumbing yard or storage.

V. Office of a physician or dentist and medical or dental clinics or laboratories operated in conjunction with such office.

- W. Public buildings and uses.
- X. Public parking area in transitional use.
- Y. Public parks, playgrounds, and other recreational uses.
- Z. Public utilities, as defined and regulated in Sec. 18-13.
- AA. Taxi stand (only private property).
- BB. Theater, indoor or outdoor.
- CC. Hotel. (Amend. 12-6-71)
- DD. Manufacture, compounding, processing, packaging, or treatment of such products as bakery goods, candy, cosmetics, diary products, drugs, perfumes, pharmaceuticals, perfumed toilet soap, toiletries and

food products except fish  
and meat products,  
sauerkraut, vinegar, yeast  
and the rendering or  
refining of fats and oils.

EE. Transitional parking lots.

(Amend. 3-69)

FF. Live entertainment and  
patron dancing in  
restaurants. (Amend. 2-71)

GG. Consumption of meals on a  
roof garden of an enclosed  
building in which a  
restaurant is located, or  
at sidewalk tables directly  
adjoining such building.

(Amend. 2-71)

(4)  
No. 91 - 965

Supreme Court, U.S.

FILED

FEB 3 1992

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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CHRIST COLLEGE, INC., et al.,  
*Petitioners,*

v.

BOARD OF SUPERVISORS OF  
FAIRFAX COUNTY, VIRGINIA, et al.,  
*Respondents.*

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**Petition For Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

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REPLY BRIEF

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**REPLY BRIEF**

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The parties' vastly differing interpretations of Employment Division v. Smith, 110 S. Ct. 1595 (1990), reveal the need to grant certiorari to clarify the standards that apply to free exercise cases. The parties' vastly differing interpretations of the facts indicate that the trial court erred in taking this important case away from the jury.

I. PETITIONERS DID PROVE THAT THEIR "HYBRID" RIGHTS WERE BURDENED AND DID NOT NEED TO PROVE RELIGIOUS ANIMUS OR DISCRIMINATION.

Petitioners' rights manifestly involve the type of free exercise and parental right hybrid situation recognized in Smith through the Pierce/Yoder line of cases upon which petitioners consistently have relied. Smith, 110 S. Ct. at 1601 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder,

406 U.S. 205 (1972)). Petitioners' rights also manifestly involve the free exercise and free speech hybrid situations involving religious instruction, worship and advocacy of ideas, as recognized in Smith, 110 S. Ct. at 1601-02. Respondents failed to address this free speech aspect.<sup>1</sup>

Respondents and the Court of Appeals incorrectly assumed that the first step in free exercise analysis is to determine the existence of a burden on religious rights. County Opp. at 39; Town Opp. at 36; App. at 8a. It is impossible for a court to determine whether a religious liberty has been burdened until the court has ascertained the nature of the right at issue and the scope of the associated

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<sup>1</sup> County respondents "will not respond" to petitioners' argument on this point because it was not "fully assert[ed]" in the trial court or on appeal. County Opp. at 39 n.15 (emphasis added). Town respondents make no mention of the argument.

religious conduct. In a tort case, no reasonable court would undertake to determine whether a breach of duty had occurred unless it had first established that a duty of care existed, and whether it was a duty of ordinary care, a heightened duty such as a fiduciary duty, or only a duty to refrain from gross recklessness. Similarly, determining whether the constitutional right at stake in this case is a "simple" free exercise right, or one that also embraces the right of parents to direct the religious education of their children, or the communication of religious beliefs is essential to evaluate the conduct at issue, and to determine whether that conduct is protected and has been burdened.

There is a lack of candor in respondents' failure to recognize that petitioners consistently have predicated

their hybrid free exercise claims on an alleged burden of religious conduct compelled by religious belief.<sup>2</sup> If the rights at stake are, as alleged, hybrid ones involving the implementation of intertwined religious beliefs and parental responsibilities, certainly a reasonable jury could have concluded that a significant burden on those rights arose from shutting down Fairfax Christian School, the only available forum to petitioners for exercising such rights. See, e.g., J.A. at 1811. Certainly a reasonable jury could have concluded that a significant burden on those rights arose from subjecting that unique forum and some of the petitioners to unprecedented

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<sup>2</sup> Respondents go so far as to emphasize that the complaint did not have a "hybrid" count. County Opp. at 39. They fail to note that the complaint was filed before Smith created this category and, immediately thereafter, petitioners began making hybrid rights arguments within the broad scope of the complaint. See, e.g., J.A. at 1344-1368 (pretrial brief).

enforcement activities and public pronouncements that hindered operation of the religious school and blackened the reputation of those associated with it.

If, as also alleged, the right at stake also includes implementation of religious free speech, certainly a reasonable jury could have concluded that the actions of the respondents were equivalent to the burdens caused by breaking up a public meeting and imposing prior restraints on such speech.

Concluding that such burdens exist is only part of the analysis, however. Petitioners and respondents disagree on whether strict scrutiny always must be applied in hybrid rights cases to determine if burdens on the constitutionally-protected conduct were justified by a sufficiently important governmental interest implemented by narrowly tailored actions. See County

Opp. at 47. This important point needs to be clarified by this Court. We submit that Yoder, on which petitioners principally rely, may not be read any other way but to require strict scrutiny. See 406 U.S. at 215, 233. That hallowed precedent should be honored or overruled; it should not be ignored as it has been by the courts below and Town respondents.<sup>3</sup> In light of Smith's approval of Yoder, it would seem difficult to justify anything but the highest levels of judicial scrutiny when essential constitutional protections in addition to free exercise are burdened.<sup>4</sup>

As Yoder and Smith demonstrate, proving "animus" or an intent to

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<sup>3</sup> Despite a clear record to the contrary, Town respondents claim that petitioners rely on Sherbert v. Verner, 374 U.S. 398 (1963). Town Opp. at 16; compare Pet. at 13 and 13 n.8.

<sup>4</sup> The fact that State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254, 263 n.10 (1990), holds otherwise demonstrates the need for clarification.

discriminate is not necessary to establish a hybrid free exercise claim. The County respondents attempt to import these elements into the free exercise analysis by asserting that petitioners' free exercise claim is "in essence" "more an equal protection challenge." County Opp. at 51. That is neither true nor helpful, nor have petitioners "reversed" their position on this, as respondents contend.<sup>5</sup>

That is not to say that the jury should not have been allowed to consider the burdens stemming from the failures to accommodate and selective enforcements alleged in this case. County respondents admit their refusal to take petitioners' religious needs into account with respect to the challenged actions. J.A. at 1425-

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<sup>5</sup> County Opp. at 52-53; App. at 16a. Intent is an element of an equal protection claim and due process claim, both of which were argued in the courts below. Petitioners never argued that it was a necessary element of free exercise claims.

27. Under Smith, this amounts to a prima facie burden on free exercise, because respondents easily could have given petitioners individualized exemptions for religious hardship. 110 S. Ct. at 1603.<sup>6</sup> Indeed, the County respondents appear to make a fatal concession in this and other regards. They admit that they accommodated Fairfax Christian School by knowingly allowing the mission to operate in violation of the zoning ordinance prior to the controversies at issue here. County Opp. at 11, see also 32 (characterizing this accommodation as favorable "disparate treatment").

Moreover, there was an abundance of evidence from which a jury could have deduced that selective enforcement of the

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<sup>6</sup> Here, the Smith majority endorses the following statement from Bowen v. Roy, 476 U.S. 693 (1986): "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."

law imposed on petitioners greater burdens than the norm, the direct opposite of the less restrictive accommodations required by Yoder. This evidence includes the following facts:

- ° Respondents ordered Fairfax Christian School evacuated when other schools having similar or greater levels of violations were not evacuated, J.A. at 1903-10;
- ° It was the "normal procedure" in Vienna to allow 30 days for correction of any code "violations," but after assurances to the contrary, the "usual procedure" was not followed with Fairfax Christian School, J.A. at 1669-76;
- ° County respondents admittedly brought an unprecedented surprise injunction suit against Fairfax Christian School after receiving explicit assurances that this religious school would not open until all building, fire and safety requirements were satisfied, County Opp. at 59;
- ° Town respondents brought an unprecedented injunction suit based on "violations" that had sprung into existence solely as a result of loss of grandfathering, when uncon-

tradicted expert testimony established that there was no imminent danger, and the school's attorney offered to suspend classes, post fire watches, or take other remedial measures pending completion of the corrections that were initiated immediately after notice of them was given, J.A. at 1566, 1678-79.

## II. RESPONDENTS MATERIALLY MISSTATE THE EVIDENCE.

Respondents' arguments reflect misstatements of the material facts and a misunderstanding of directed verdict standards.<sup>7</sup> The boldness of these misstatements cannot be understated, although space limitations allow only for examples.

The County respondents assert that

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<sup>7</sup> On appellate review of a directed verdict the "Court of Appeals [is], of course, bound to view the evidence in the light most favorable to [the non-moving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962). It is the jury, not the trial or appellate courts, that "weighs the contradictory evidence and inferences" and draws the "ultimate conclusion as to the facts." Id. at 701.

"The Drydens hold no religious belief that requires their children to be educated at FCS." County Opp. at 4. This is a misleading characterization of extensive testimony on the Dryden petitioners' religious convictions, which include the conviction that their children's education in the classroom should "teach them in a Godly way subjects being presented from a Biblical perspective and God being at the center of every aspect of the education." J.A. at 1810. Respondents lack candor in failing to call this Court's attention to the clearly articulated belief of Mr. Dryden, who resided with his family in Fairfax County and worked there, that Fairfax Christian School was the only school that would satisfy his religious requirements in that County or the surrounding area. J.A. at 1811.

Despite respondents' admissions and the trial court's findings of petitioners' sincerely-held religious beliefs, respondents go out of their way to slur petitioners. For example, they alleged that petitioners' actions were "motivated solely by business reasons" and characterized Rev. Robert Thoburn's "wealth" as growing to over \$10 million in the 1980's. Town Opp. at 30; County Opp. at 4. The alleged business motivation is contradicted by respondents' own admissions that the Thoburns were engaged in a religious mission, J.A. at 1732, 1734, and the uncontested testimony of Rev. Thoburn. J.A. at 1517-1518. The multimillion dollar "wealth" characterization related to the now much-diminished value of land accumulated by Rev. Thoburn primarily to build Christian schools. J.A. at 1514-15. Robert Thoburn lost millions of dollars operating Fairfax

Christian School, J.A. at 1584, and the principal of the school, petitioner Lloyd Thoburn, testified unequivocally and passionately that money could not possibly be the motivation for the Thoburn family's religious conduct. J.A. at 1761.

In another statement that lacks candor, Town respondents averred that, "The Thoburns presented no evidence at trial to show that County attorneys worked with Vienna attorneys on the injunction case." Town Opp. at 12. "No evidence," that is, except for the cross-examination testimony of the highest ranking executive of the County, J. Hamilton Lambert, who expressly "admitted" that "our [County] attorneys worked with theirs [Town attorneys]" on the injunction case. J.A. at 1727-28.

Respondents also engage in straw man arguments. For example, the County respondents argue that the "evidence in

the case at bar does not reveal any religious belief which required the Thoburns to take any action which was inconsistent with any of the zoning or building regulations applied by County officials to FCS." County Opp. at 56. Of course the evidence does not reveal such a belief. Petitioners never made such a contention and, prior to the instant controversy, the County accommodated petitioners by using less restrictive means to enforce its regulations. County Opp. at 11, 32.

What petitioners did contend was that they have a sincere religious belief requiring them to operate a religious mission school and to have their children educated there. They proved this contention to the satisfaction of the trial court, which made a specific finding on their religious dedication in this regard. App. at 27a.

III. PETITIONERS DID RAISE AN "AS APPLIED" CHALLENGE, AND THE COURTS BELOW DID REFUSE TO TREAT IT AS SUCH.

Contrary to respondents' astounding arguments, it is abundantly clear that neither court below analyzed this case as an "as applied" challenge to the actions taken by respondents. Compare respondents' contentions, County Opp. at 50-53; Town Opp. at 31-35, with what the courts actually said, App. at 7a-9a and 28a-29a.

For one of many examples, the court of appeals, in its discussion of free exercise, clearly held that petitioners "have not proved that the zoning laws or fire codes burden their exercise of religion." App. at 8a (emphasis added).

IV. TOWN RESPONDENTS VIRTUALLY CONCEDE AN ESTABLISHMENT CLAUSE VIOLATION.

Town respondents surprisingly assert that, "This Court's interpretation of the Establishment Clause is fully set forth in Illinois ex rel. McCollum v. Board of

Education, 333 U.S. 203 (1951)," (emphasis added). Town Opp. at 39. Relegated to "see also" status was Lemon v. Kurtzman, 403 U.S. 602 (1971), at all relevant times the leading precedent in this area of the law, at least as of the time of this Reply Brief. Town Opp. at 40.

Lemon, of course, establishes the much-discussed three-prong test. To pass muster under the Establishment Clause, the challenged regulation must satisfy all of the following tests: it must have a secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must not foster excessive governmental entanglement with religion. 403 U.S. at 612-13.

Petitioners specifically pled in their complaint that the Town respondents "became improperly entangled in matters that must be reserved to religious institutions" when they prohibited

religious and other uses by Fairfax Christian School of the Vienna Assembly of God Church sanctuary. J.A. at 1210. Such entanglement is evident on the face of the Town's prohibition. Absent some truly overriding governmental concern, the Town respondents have no legitimate warrant for deciding whether schoolchildren may pray and have religious lessons -- or even math lessons -- in a church sanctuary.

The Town respondents argue that there is no Establishment Clause violation because "the Thoburns presented no evidence at trial" that the permit restrictions "addressed anything but secular concerns," and because the issuance of the permit was a "secular act." Town Opp. at 40-42. If one were to view the evidence in the light most favorable to the Town regulators, their sanctuary prohibition must be considered unconstitutional because it has, at best,

no purpose, whatsoever.<sup>8</sup> Clearly, the primary effect of this restriction is to inhibit the exercise of religion through the meaningless limitation of options for religious school teaching locations.

The Town respondents do not attempt to show lack of entanglement or offer any justifiable basis for their unprecedented prohibitions. Instead, they argue that this prohibition "did not affect the curriculum of the FCS or otherwise interfere with the Thoburns' religious beliefs or practices." Town Opp. at 41. That is both wrong and irrelevant. The prohibition directly interfered with religious practices by prohibiting prayer and religious classes that previously had been conducted before the Cross in this sacred location. J.A. at 1574-1575, 1755.

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<sup>8</sup> No reason for this extraordinary prohibition was given at the time it was issued, and none was provided at trial.

CONCLUSION

There is an established, critical need to clarify the standards that apply in deciding a case in which free exercise and other fundamental rights are inextricably intertwined. This case provides the Court with an opportunity to satisfy that important need.

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